IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 59

IN THE MATTER OF MARCUSE & COMPANY,
ALLEGED BANKRUPTS.

C. B. GILES, ET AL.,
Petitioners,

vs.

HENRY VETTE, ET AL.,
Respondents.

BRIEF AND ARGUMENT FOR PETITIONERS.

WILLIAM BURRY,
JULIUS MOSES,
GUY M. PETERS,
LEWIS F. JACOBSON,
Attorneys for Petitioners.

INDEX.

Table of Cases.

IN THE

Supreme Court of the United States.

October Term, 1923.

No. 59.

In the Matter of **MARCUSE & COMPANY**,
Alleged Bankrupts.

C. B. GILES, et al.,
Petitioners,
vs.
HENRY VETTE, et al.,
Respondents.

BRIEF AND ARGUMENT FOR PETITIONERS.

On March 11 and 12, 1920, petitions in bankruptcy were filed against Marcuse & Company, a firm engaged in the stock brokerage business in Chicago. On the following day a receiver in bankruptcy was appointed for the firm.

A dispute at once arose as to who were members of the bankrupt firm. The District Court, in sending the case to a referee, held that all the respondents were general partners with Ben Marcuse and L. H. Morris in the bankrupt firm. Respondents, insisting they were not members of the firm, filed a petition to review and revise that holding of the District Court. The Court of Appeals held by a divided court, that Marcuse and

Morris only were members of the firm and exonerated the respondents.

We are now here on a writ of *certiorari* bringing up the record from the Court of Appeals for consideration by this court.

The main question to be here considered is whether the respondents were general or limited partners in the brokerage firm of Marcuse & Company. The partnership was formed by written articles signed June 30th, and recorded July 2, 1917. An attempt was made to form a limited partnership, under the Illinois Act of 1874, with Marcuse and Morris general partners and the other respondents as special partners. The partnership articles were signed June 30, 1917, but the statutory certificate (an absolute prerequisite to the formation of such a partnership) was not filed until July 2nd.

Meantime the Uniform Limited Partnership Act took effect in Illinois on July 1, 1917, and it forbade the organization of limited partnerships for brokerage purposes. On the same day the Illinois Act of 1874 was repealed except as to limited partnerships then existing.

Petitioners also insisted that the certificate of limited partnership that was recorded on July 2nd did not correctly set forth who were the limited partners or truthfully state the amounts of their contributions, and that for this additional reason no limited partnership was created.

The Court of Appeals practically conceded that a limited partnership under the Act of 1874 was not formed or existing until the partnership certificate was filed, that the 1874 Act was repealed before the certificate was filed and that therefore no limited partnership was formed thereunder. But that court held that respondents were relieved from the obligations of general part-

nership by applying Section 11 of the new Uniform Limited Partnership Act (although under it a brokerage firm could not be formed) to the brokerage firm of Marcuse & Company; and also that by Section 7 of the new Uniform *General* Partnership Act of Illinois a situation was brought about whereby the parties, including the respondents, operating for over two years under the firm name of Marcuse & Company were not partners at all nor liable as such. The points on which the Court of Appeals *relieved all the parties to the partnership from all liability as partners* were practically those of confession and avoidance.

The questions involved and the positions taken by the conflicting interests are clearly set forth in the ruling and dissenting opinions of the Court of Appeals. These opinions are printed in the record beginning on page 735 and were also printed as an appendix to our petition for a writ of *certiorari*. We think the reasoning of the dissenting opinion of Judge Evans is unanswerable, and is decisive of the case.

STATUTES INVOLVED.

The determination of the issues involve the application and construction of certain provisions of the Illinois Limited Partnership Act of 1874, the Illinois Uniform Limited Partnership Act, and the Illinois Uniform (General) Partnership Act, the two latter effective July 1, 1917. The material provisions of these statutes are set forth in the margin.

SECTIONS FROM THE ILLINOIS LIMITED PARTNERSHIP ACT OF 1874.

Sec. 2. Limited partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible, as general partners now are by law, and of one or more persons who shall contribute a specific amount of capital, in cash, or other property at cash value, to the common stock, who shall be special partners, and who shall not be liable for the debts of the

STATEMENT OF FACTS.

Prior to 1917 there was in Chicago a stock brokerage firm named Von Frantzius & Co. In March, 1917, that firm was in bankruptcy. Von Frantzius had died and his estate was then in the Probate Court. Bankruptcy proceedings had been brought about by his death and the consequent discovery of his firm's insolvency. Marcuse had been a partner in Von Frantzius & Co. and Morris an employee. All the other respondents hereto

---

partnership beyond the amount of the fund so contributed by them, respectively, to the capital stock, except as hereinafter provided.

4. CERTIFICATE. Sec. 4. The persons desirous of forming such partnership shall make and severally sign a certificate, which shall contain:

1. The name or firm under which the partnership is to be conducted.

2. The general nature of the business to be transacted.

3. The names of the general and special partners therein, distinguishing which are general and which are special partners, and their respective places of residence.

4. The amount of capital stock which each special partner shall have contributed to the common stock.

5. The period at which the partnership is to commence, and the period when it will terminate.

5. CERTIFICATE ACKNOWLEDGED. Sec. 5. Such certificate shall be acknowledged by the several persons signing the same, before some officer authorized by law to take the acknowledgment of deeds; and such acknowledgment shall be made and certified in the manner provided by law for the acknowledgment of deeds for the conveyance of land.

6. RECORD OF CERTIFICATE. Sec. 6. The certificate, so acknowledged and certified, shall be filed in the office of the clerk of the county in which the principal place of business shall be situated, and shall be recorded at large by the clerk, in a book to be kept by him; and such book shall be subject, at all reasonable hours, to the inspection of all persons who may choose to inspect the same.

7. AFFIDAVIT. Sec. 7. At the time of filing the original certificate, as before directed, an affidavit of one or more of the general partners shall also be filed in the same office, stating that the amount in money, or other property at cash value, specified in the certificate to have been contributed by each of the special partners to the common stock, has been, actually and in good faith, contributed and applied to the same.

8. FILING FOR RECORD NECESSARY—FALSE STATEMENT. Sec. 8. No such partnership shall be deemed to have been formed until such certificate, acknowledgment and affidavit shall have been filed, as above directed; and if any false statement shall be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof, as general partners.

had been customers of the firm of Von Frantzius, and all of them, except Vette and Zuncker, were creditors in large amounts.

Marcuse, Morris and all the respondents determined, at the solicitation of Marcuse, to form a new partnership to succeed to the Von Frantzius brokerage business and seek to recover what they had lost through that firm. Vette and Zuncker were induced by Marcuse to come in on the promise of large profits and probably because they were not creditors of Von Frantzius were given a

---

SECTIONS FROM THE ILLINOIS UNIFORM LIMITED PARTNERSHIP ACT.

"Section 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* A limited partnership is a partnership formed by two or more persons under the provisions of Section 2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership."

"Section 2. (1) Two or more persons desiring to form a limited partnership shall

(a) Sign and swear to a certificate, which shall state

I. The name of the partnership,

II. The character of the business,

III. The location of the principal place of business,

IV. The name and place of residence of each member; general and limited partners being respectively designated,

V. The term for which the partnership is to exist,

VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned,

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

XI. The right, if given, of the partners to admit additional limited partners,

XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,

XIII. The right, if given, of the remaining general partner

special agreement by Marcuse indemnifying them against loss.

It was arranged that the new firm should be a limited partnership under the Illinois Act of 1874, with Marcuse and Morris as general partners and all the other respondents hereto as special or limited partners. It was also agreed that 25 per cent of the net earnings of the

---

or partners to continue the business on the death, retirement or insanity of a general partner, and

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution,

(b) File for record the certificate in the office of the recorder of deeds of the county where the principal office of such limited partnership is located.

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph 1."

"Section 3. A limited partnership may carry on any business which a partnership without limited partners may carry on, except banking, insurance, brokerage and the operation of railroads."

"Section 11. A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income."

"Section 28. (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this Act.

(2) This Act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(3) This Act shall not be so construed as to impair the obligations of any contract existing when the Act goes into effect, nor to affect any action or proceedings begun or right accrued before this Act takes effect."

"Section 30. (1) A limited partnership formed under any statute of this State prior to the adoption of this Act, may become a limited partnership under this Act by complying with the provisions of Section 2; *provided* the certificate sets forth:

(a) The amount of the original contribution of each limited partner, and the time when the contribution was made, and

(b) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(2) A limited partnership formed under any statute of this State prior to the adoption of this Act, until or unless it becomes a limited partnership under this Act, shall continue to be governed by the provisions of an Act entitled, 'An Act to revise the law in relation to limited partnerships,' approved March 18, 1874, in force July 1, 1874,

new firm should first be drawn out by Marcuse and by him distributed and devoted to making good to respondents their losses through the Von Frantzius firm, and under date of February 1, 1917, a document was drawn up (Rec., 474) in which Marcuse elaborated a plan for settling the estate of Von Frantzius.

The written plan provided that Marcuse should issue certificates to each of the Von Frantzius creditors, stat-

---

except that such partnerships shall not be renewed unless so provided in the original agreement."

"Section 31. Except as affecting existing limited partnerships to the extent set forth in Section 30, the Act entitled, 'An act to revise the law in relation to limited partnerships,' approved March 18, 1874, in force July 1, 1874, is hereby repealed."

SECTIONS 6 AND 7 OF THE ILLINOIS UNIFORM (GENERAL) PARTNERSHIP ACT.

"Section 6. (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this State, or any statute adopted by authority, other than the authority of this State, is not a partnership under this act, unless such association would have been a partnership in this State prior to the adoption of this Act; but this Act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith."

"Section 7. In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by Section 16, persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by installments or otherwise;

(b) As wages of an employee or rent to a landlord;

(c) As an annuity to a widow or representative of a deceased partner;

(d) As interest on a loan, though the amount of payment vary with the profits of the business;

(e) As the consideration for the sale of the good will of a business or other property by installments or otherwise."

ing the amount of the indebtedness of the Von Frantzius firm to the holder, and that each of the creditors should assign to Marcuse his claims against the Von Frantzius estate, thereby giving to Marcuse practical control of that estate and that Marcuse should then acquire the estate at judicial sale, dismiss the bankruptcy proceedings, form such a partnership as was afterwards formed, and from the net proceeds of the Von Frantzius estate and 25 per cent of the net earnings of the new firm (a fund set aside for that purpose) pay the Von Frantzius creditors what was owing them from that firm.

The plan thus initiated in January or February, contemplated that it would take until about July 1st to close up the Von Frantzius estate and bankruptcy, and there would be, therefore, several months in which to perfect the contemplated partnership articles and arrangement.

The partnership was finally formed, continued in operation for about two years and nine months and was then put into bankruptcy as above stated.

What was done in forming the partnership, the purposes of the parties, the object of the partnership and nearly all other matters required for consideration and determination of this case, are largely shown in three documents that appear in the record. These three documents are:

1. A partnership agreement dated April 2, 1917, and signed at that time, for a limited partnership to carry on a brokerage business, the firm to be composed of Marcuse and Morris as general partners and *all* the respondents hereto as special partners. (Rec., 269.)*

2. An agreement for a like limited partnership dated

*Note: All references are to top paging of the reprint of the transcript of record.

April 2, 1917, but signed June 30, 1917, with Marcuse and Morris as general partners and the respondents Hecht and Finn as special or limited partners. This agreement, although dated April 2nd, is usually referred to as the partnership agreement of June 30, 1917, as it was signed on that date. (Rec., 20.)

3. An agreement dated June 30, 1917, and on that date signed by Hecht and Finn and approved by Marcuse and Morris, providing that Hecht and Finn, as special partners under the partnership articles signed June 30th, should represent all the respondents including themselves, and that the special capital should be contributed by all the respondents as originally determined. This document is generally referred to as the Hecht-Finn trust agreement. (Rec., 26.)

Around and upon these three documents hangs all the other evidence in the record, showing the circumstances under which those documents were signed, the reasons leading to certain changes therein, the differences between, and the contemporaneous construction put upon the documents by the parties for the two years during which the partnership continued. In a proceeding of this nature all facts on which there is any evidence must be resolved in favor of supporting the District Court's decision.

Original Partnership Agreement.

The gist of the first partnership agreement is given in the statement of facts by the Court of Appeals as follows:

> "The record discloses that under date of April 2, 1917, all the alleged partners except the Studebakers (one Hoffman signing in his own name, but in fact as representing the Studebaker interest), executed an agreement which provided for carrying

on at Chicago a brokerage business of buying and selling on commission stocks, bonds, grains, etc., for a period of five years from such date, under firm name of Marcuse & Co.; that such firm be a limited partnership under the statute of Illinois, Marcuse and Morris the general partners, and the others special partners; the contributions of the latter to be, Hecht $25,000, Hoffman $50,000, Vette $30,000, Zuncker $25,000, Finn $31,500 and Regensteiner $28,-500, total $190,000; that the business be conducted and managed by Marcuse and Morris, they to receive named salaries, and that on the contributions of Marcuse, Morris and of the special partners should be paid interest at 6 per cent per annum; that thereafter 25 per cent of the net profits be paid to Marcuse to be applied by him on certain certificates which he would issue representing debts due from Von Frantzius & Co. (then in bankruptcy), all of such limited partners, except Vette and Zuncker, being large creditors of the Von Frantzius concern; and that *after* such certificates are paid, the said 25 per cent should be paid to all the parties to the agreement except Morris; that 10 per cent of the net profits of the business was payable to Morris, *and the balance of profits was to be divided periodically between the parties in proportion to their contributions to the whole capital;* that the special partners be limited in their liability to the amounts respectively contributed to the capital, and that they should have no liability for debts of the partnership beyond such contributions; that Marcuse and Morris should be in charge of and carry on the business, and that *the special partners shall have right to examine the books* and have them audited, *and in certain contingencies to have the business liquidated.* After execution of the agreements they were left with one of the lawyers pending carrying out of certain conditions, mainly the dismissal of the Von Frantzius bankruptcy proceedings, with which concern Marcuse had been in some way connected. One of the contributions of Marcuse toward the firm's capital was a seat on the New York Stock Exchange estimated to be then worth $68,000."

After providing for the 6 per cent interest, the 25 per cent for the Von Frantzius creditors and some other expenses, the contract provided that:

> "All of the balance of the said net profits of said business shall be divided among *all* of the parties hereto except the said Morris in the proportions in which they have contributed to the capital or capital stock of said firm." (Rec., 23.)

It was further provided

> "that the said partners shall and will during all times during said copartnership bear, pay and discharge in the same ratio and proportion in which the profits are to be divided as aforesaid, all expenses incurred in the operation of the said business, * * * and that *all losses of every kind* sustained in said business *shall be paid by the said copartners* in the same ratio and proportion as said profits are divided." (Rec., 23.)

On April 12, 1917, this partnership contract was signed by all the parties. All the parties (Hoffman acting for the Studebakers) were present in one room at the time of the signing. (Rec., 227.)

The certificate required by the Act of 1874 was prepared reciting that all the respondents (Hoffman still acting for the Studebakers) desired to form a special partnership under the Act of 1874 to conduct a brokerage business. It gives the amount of the contributions as provided in the partnership articles and was severally signed and acknowledged by each of the special partners. An affidavit of Marcuse was attached certifying that the contributions of the special partners, aggregating $190,000, had been actually and in good faith paid in and applied to the purposes of the partnership.

The signed partnership agreement was delivered to Colonel Foreman, counsel for Vette and Zuncker, to be held by him until Marcuse had acquired the Von Frantzius assets and secured dismissal of the bankruptcy

proceedings against the Von Frantzius estate. (Rec., 318.)

Shortly after this escrow deposit a serious obstacle arose. A membership on the New York Stock Exchange was absolutely necessary to carrying on the business, but when Marcuse went to New York to have his firm admitted to the exchange, he discovered that the rules of that exchange provide, *first*, that in any brokerage firm with a membership on that exchange there could only be two special partners, and, *second*, that no person engaged in any other business could be a partner in such a firm. On his return from New York, Marcuse received the following telegram from the secretary of the New York Stock Exchange:

> "The committee on admissions would not object to a firm having two special partners if they were not engaged in any other business and were otherwise passed upon favorably by said committee." (Rec., 476.)

No thought of abandoning the plan for the partnership occurred to any of the parties who had signed the first agreement. They determined to circumvent or avoid the rules of the New York Stock Exchange. It was found that Hecht and Finn had retired from business and were therefore qualified as members of a brokerage firm. The other special partners were engaged in other businesses. It was determined that the partnership should proceed just as originally planned, with, however, Hecht and Finn appearing as special partners and *representing* all the respondents. No other change whatsoever was to be made in the arrangements.

The Studebakers' counsel testified that the intention was to withdraw them entirely from the partnership, but this testimony is not consistent with, and was con-

tradicted by that of Marcuse, Finn, Regensteiner, Hoffman and Zuncker. (Rec., 456-474, 257, 428, 680, 380.)

It is conceded in both the controlling and dissenting opinions of the Court of Appeals that upon a petition to review and revise only questions of law can be considered, and that every fact necessary to support the District Court's order which is supported by any evidence must be assumed as existing. Counsel on both sides of the case concurred in this proposition. In the argument, however, we will show from the testimony that the court could have reached no other conclusion than that the sole object of redrafting the original partnership articles was to avoid the rule of the New York Stock Exchange.

Revised Partnership Agreement.

This brings us to the second vital document in this case. It is the revised partnership agreement (Rec., 20, still dated April 2nd but actually signed June 30th, under which the partnership was finally formed and under which it continued for over two years, when it was put into bankruptcy. As if to preserve the continuity of the transaction and to show that it is but a paraphrase of the former partnership agreement, it bears the same date, April 2, 1917.

Of this second document the Court of Appeals in its statement of facts said:

> "The stated objects of the partnership, the name and the details respecting rights, duties and immunities of the parties, and the character and amount of capital contributions were in all essential features the same as under the first contract, except that Hecht and Finn, the special partners, each agreed to contribute $95,000, and the term was five years from July 1, 1917."

This agreement was signed by Marcuse, Morris, Hecht and Finn. The total amount of capital contributed by all the respondents under the first agreement was $190,-000. The amount of capital recited as contributed by Hecht and Finn under the new agreement was $190,000. The contribution under the second agreement was actually by all seven of the respondents, each contributing the same amount that he agreed to contribute under the first agreement. The provisions for a limited liability are the same. The provision that 25 per cent of the net profits should go to Marcuse to pay the creditors of Von Frantzius is the same. The provision for Morris and that all other net profits shall be divided among all the others is exactly the same. The provisions concerning the keeping of books, access thereto, general statements, trial balances, *declaring dividends, sharing in losses*, the amount of special capital, the appointment of auditors and the authority of the special partners to wind up the business, are all the same as in the former agreement.

Necessarily there were some differences or the second contract would still be obnoxious to the New York Exchange. Necessarily this second document omitted on its face some rights of respondents other than Hecht and Finn. Although the latter two actually contributed only about one-third of the special capital, they could, under the second agreement, draw the dividends due all the special partners. The respondents other than Hecht and Finn, although contributing two-thirds of the special funds, were without power to appoint an auditor, without power to order a dissolution.

Thereupon the third principal document was drawn on the same day and is sometimes referred to in the record as the Hecht-Finn trust. It appears at page 26 of the printed record.

The Hecht-Finn Agreement.

This instrument was executed June 30th, at the same time as the second partnership agreement and as part of that transaction, and has attached to it as an exhibit a copy of the partnership agreement of June 30th. It is sometimes called the Hecht and Finn trust, though in reality no trust at all.

This third agreement recites that Hecht and Finn are entitled, as special partners under the *second* partnership articles, to 6 per cent on the special capital contributed by them and also to their share of the profits; that the other five respondents are entitled to a like distribution of interest and profits on the capital they furnished; recites the amount of the contribution by each; provides for a certificate from the Chicago Title & Trust Co. showing the contribution of each; provides that the entire dividends payable to all the respondents, including Hecht and Finn, shall be paid by the firm to the Chicago Title & Trust Company, which shall thereupon distribute such receipts in accordance with the interests of the seven respondents or certificate holders in the partnership and calls Hecht and Finn trustees. It restores to the respondents (other than Hecht and Finn) their access to the books of account showing, among other things, all losses sustained, liabilities incurred and all payments by and receipts of general partners, and requires that they be furnished with accounts showing assets, *liabilities* and *losses* and with monthly balance sheets.

It further provides that auditors shall be appointed, not by Hecht and Finn, but by a majority of the holdings of the seven special partners. It restores to the control of the majority of them the right to dissolve the firm

if the auditors' report is unfavorable, provides that Hecht and Finn shall act as directed by the wishes of a majority of the respondents, and if they do not do so, the holders of the majority of them can apply for a dissolution of the partnership, and in the event of the death of both trustees the majority of the remainder of the special partners shall appoint a new trustee.

Under its provisions, the Chicago Title & Trust Company were to issue certificates representing the following amounts:

Frank A. Hecht,	$25,000
Joseph M. Finn,	31,500
Richard Yates Hoffman,	50,000
Theodore Regensteiner,	28,500
Henry Vette,	30,000
Peter M. Zuncker,	25,000

There was attached to the agreement as an exhibit, a document signed by Marcuse, Morris, Hecht and Finn, both individually and as copartners under the name of Marcuse & Co., consenting and agreeing to carry out all the terms and provisions of the Hecht-Finn agreement. (Rec., 31.)

The second partnership agreement and the Hecht-Finn agreement with Marcuse and Morris joining in the latter, restored all respondents to exactly the same rights which they had under the first partnership agreement, the only difference being that under the latter document only two limited partners appeared on the face of the papers and the rule of the New York Stock Exchange was ostensibly avoided.

Closing the Agreement.

Pending these negotiations, Marcuse had kept open the former place of business of Von Frantzius and continued the ticker and blackboard service.

On June 30, 1917, all respondents or their attorneys went to the office of Marcuse & Co.; Hecht and Finn drew their checks to Marcuse & Co. for $25,000 and $35,000, respectively (the amount they were to personally contribute), and each of the other respondents drew their checks for the amount of their respective contributions, making the checks payable to the order of Hecht and Finn, who immediately endorsed them over to Marcuse & Co. and they were placed to the credit of that company.

The attempt to form a limited partnership failed. The certificate of limited partnership did not correctly state the membership of the proposed firm or the amount of the contributions thereto, and was not filed until after the repeal of the only act under which a limited partnership could be formed to conduct a brokerage business.

Prior to July 1, 1917, limited partnership in Illinois could only be formed under the Illinois Limited Partnership act of 1874. Sec. 4 of that act was:

> "The persons desirous of forming such partnership shall make and severally sign a certificate which shall contain: 1. * * *; 2. * * *; 3. The names of the general and special partners therein, distinguishing which are general and which are special partners, and their respective places of residence; 4. The amount of capital stock which each special partner shall have contributed to the common stock."

Secs. 5 and 6 require that this certificate shall be acknowledged by the "several persons signing the same," and filed in the office of the county clerk.

Sec. 7 provides that at the time of filing the original certificate an affidavit of one of the general partners shall also be filed stating that the amount of money speci-

fied in the certificate to have been contributed by the special partners has been, actually and in good faith, paid in.

Sec. 8 provides:

> "8. No such partnership *shall be deemed to have been formed until such certificate, acknowledgment and affidavit shall have been filed,* as above directed; and if any false statement shall be made in such certificate or affidavit, *all the persons interested in such partnership shall be liable* for all the engagements thereof, *as general partners.*"

A new certificate was prepared June 30th, reciting that Marcuse, Morris, Hecht and Finn desired to form a limited partnership under the provisions of the 1874 limited act. (Rec., 239.) It recites that it is made under the 1874 act. The certificate names Marcuse and Morris as general partners and Hecht and Finn as special partners and the amount of contribution of the two special partners as $95,000 each. This certificate was not filed in the office of the county clerk until *July 2, 1917.*

In 1917 Illinois passed the Uniform Partnership act and the Uniform Limited Partnership act. The new acts took effect on July 1, 1917, and the new Uniform Limited Partnership act expressly repealed the Limited Partnership act of 1874, except as to then existing limited partnerships.

The new Uniform Limited Partnership act provided that a limited partnership could be formed to carry on any business except banking, insurance, *brokerage* and the operation of railroads. It materially changed the form of the certificate to be signed and provided that the certificate should be recorded in the office of the Recorder of Deeds. In many other material ways it differed from the Limited Partnership act of 1874.

There is no serious contention in the record that a

limited partnership was formed either under the Act of 1874, or under the Uniform Limited Partnership act of 1917. One vital step which the 1874 act expressly required as a condition precedent to the formation of a limited partnership was not taken until after the act had been repealed. The new Uniform Limited Partnership act expressly provided that a brokerage business could not be carried on as a limited partnership, and no attempt was made to conform to the requirements of that act.

The partnership of Macuse & Co. started business on July 2nd, carried on a brokerage business for about two years and nine months, when it failed.

After the petition in bankruptcy and the intervening petition of Lachman, asserting the liability of Hecht and Finn as general partners, had been filed, Hecht and Finn tendered the receiver $46,000. This amount was claimed to be all that Hecht and Finn and the other respondents had received from Marcuse & Co. by way of interest, income and profits from Marcuse & Co., and was accompanied by a written document by which they "renounced" any claims against the assets of the copartnership arising out of the investment of $190,000 as special partners in that firm. This was done in an attempt to bring themselves under Section 11 of the new Uniform Limited Partnership act.

None of the other respondents contributed to the amount of this tender, but expressly refused to do so and expressly refused to authorize Hecht and Finn to make the tender on their behalf or to renounce their interest in the partnership. The tender was refused and the money was paid into court.

Pleadings.

On March 11th the original petition in bankruptcy was filed by Giles and others against Marcuse, Morris, Finn and Hecht, copartners doing business as Marcuse and Company. On the following day a receiver was appointed.

March 12th Mayer and others filed intervening petitions adopting the allegations of the original creditors' petition.

March 15th Lachman filed his intervening petition alleging the partnership to be in fact a general partnership.

Hecht and Finn answered denying that they became general partners, and claiming further that if they had so become general partners they had absolved themselves from liability by the tender to the receiver of the profits they had received from the firm under Section 11 of the new act.

April 1st Finn filed an amendment to his answer alleging that in assuming the position of special partners, Hecht and himself were acting not only for themselves but on behalf of Regensteiner, Vette, Zuncker and one Richard Yates Hoffman, the latter in turn acting for the Studebakers; and that if they were liable as general partners, the other respondents were also liable.

Vette, Zuncker, Regensteiner and the Studebakers filed separate answers denying that there were special partners.

By stipulation of the parties the court first heard the question of partnership, reserving the question of insolvency.

On June 21st the district court announced that he

had reached his conclusion on the question presented and stated that conclusion to be that Vette, Zuncker, Regensteiner and the Studebakers together with Hecht and Finn were all general partners in the firm of Marcuse & Company; that the so-called special partnership, by reason of failure to comply with the Illinois statute, was a general partnership; and that the Studebakers, Zuncker, Vette and Regensteiner had selected Hecht and Finn as their agents for the operation of the special partnership. This conclusion the court stated to be his finding.

The court then referred the cause to a referee on the issue of insolvency.

To review this finding and order of the district court the respondents filed in the Circuit Court of Appeals the petition to revise and review. The Circuit Court of Appeals directed that the order referring the cause to a referee on the issue of insolvency be modified by striking therefrom the names of all respondents except Marcuse and Morris.

Error Relied On.

Petitioners assign as error the ruling of the Circuit Court of Appeals that the respondents were not general partners in the firm of Marcuse & Co.

BRIEF OF ARGUMENT.

I.

All Respondents Are Equally Liable. In the Attempt to Form the Special Partnership Under the June 30th Agreement, Hecht and Finn Were Acting as the Agents or Representatives of the Other Respondents. The Original Partnership Agreement of April 2nd, Signed by All the Parties and Placed in Escrow, Was Abandoned, and the Two Later Documents Substituted Therefor, to Circumvent the Rule of the New York Stock Exchange. The Change Was One of Form Only.

(a) Under the partnership agreement of June 30th, and the Hecht-Finn Trust, all respondents had identically the same rights and are subject to the same liabilities.

1. They all contributed to the capital.
2. They all shared in the profits and losses.
3. They all were entitled to examine the partnership books and into the partnership affairs.
4. They all were to receive monthly statements and annual audits and inventories.
5. The majority had the right to dissolve the partnership.

(b) Under the partnership agreement of June 30th, the only discretionary power Hecht and Finn, the special partners, had was to appoint auditors, and under the Hecht-Finn Trust their action in appointing auditors was subject to the control of the majority of the contributors.

(c) The so-called Hecht-Finn Trust is not a trust at all. It is nothing more than a declaration of agency. Hecht and Finn held no property, received no dividends

and made no disbursements. They exercised no rights, except in the appointment of auditors, and in this, they were under the control of the majority of the contributors. It was not a trust at all.

(d) The final adoption of two documents to evidence the parties' rights instead of the single partnership agreement, was merely to avoid the rule of the New York Stock Exchange and was not intended to affect substantial rights.

II.

The Attempt to Form a Limited Partnership Failed, and No Limited Partnership Was Ever Formed.

(a) The Act of 1874 under which the attempt was made to form this limited partnership provided, that a special partnership should not be deemed to be formed until the statutory certificate had been filed (Hurd's Ill. Rev. Stat. 1915-16, Ch. 84, Sec. 8; Brief, p. 4 margin). The certificate was not filed until after the repeal of the act.

(b) Had the certificate been filed prior to the repeal of the act, respondents would have been liable as general partners because of the false statements in the certificate.

1. The certificate gave the contributions of Hecht and Finn as $95,000 each. Hecht contributed but $25,000, Finn $31,500.
2. The certificate did not show the amounts contributed by the other respondents and did not even give their names.
3. The statute under which they attempted to form this special partnership expressly provided that if any false statements are made in the state-

ment, all persons interested in the partnership shall be liable as general partners.

Ill. Rev. Stat. 1915, Ch. 84, Sec. 8; brief page 4 margin.

Cummings v. *Hayes,* 100 Illinois App. 347.

Buckley v. *Lord,* 24 How. Prac. 455.

(c) No limited partnership was formed under the Uniform Limited Partnership Act.

1. The Uniform Limited Partnership Act, effective in Illinois, July 1, 1917, provided that limited partnerships could be formed for any purpose except banking, *brokerage*, insurance or the operation of a railroad. (Cahill's Ill. Rev. Stat. 1921, Ch. 106a, Par. 47; Brief, page .... margin.)

2. This legislation is in accord with the public policy of Illinois, which does not permit of the incorporation of a company to carry on a *brokerage* business, and requires banking and insurance companies to be incorporated under statutes distinct from the general corporation act with special provisions for protection of customers.

3. No attempt was made to comply with the essential provisions of the Uniform Limited Act.

III.

Section 11 of the Illinois Limited Partnership Act Has No Application.

(a) Section 11 was not intended as an amendment to the prior limited partnership acts or to apply to any partnership formed or attempted to be formed under prior acts.

1. The Uniform Act defines the term "limited partnership" as a partnership formed under the provisions of Section 2, of the Uniform Act. Thereafter, throughout the act, the words "limited partnership" are used without qualification in accordance with this definition. When a limited partnership formed under any other act is intended it is so expressly designated.

2. Therefore, Section 11, in providing that a person erroneously believing that he has become "a limited partner in a limited partnership" etc., means a limited partnership formed under the Uniform Act, and not formed under prior acts.

3. Section 30 of the Uniform Act expressly provides that limited partnerships formed under existing statutes should continue to be governed by those statutes until they bring themselves under the Uniform Act by complying with its provisions. This section was intended to prevent interweaving of the statutes and the provisions of the Uniform Act being construed as an amendment to the prior statute. As respondents did not and could not bring themselves under the Uniform Act, this attempted limited partnership is governed solely by the prior act and that act has no provision similar to Section 11 of the Uniform Act.

(b) Even if it could be contended, that although ignorant of the passage of the Uniform Act, the attempt was made to form this limited partnership under that act, section 11 would not relieve respondents from liability, as that section was not intended to relieve from liability as general partners, parties attempting to form a limited partnership for a purpose expressly prohibited by that act. By excluding brokerage business from the purposes for which a limited partnership can be formed, the legislature intended that such business could only be carried on as a general partnership. To apply Section 11 to such a partnership would be to nullify the legislative intention for unlimited liability in a brokerage business.

(c) Respondents could have had no "erroneous belief" that they were limited or special partners.

1. Ignorance of the law cannot be made the basis of an erroneous belief.

2. All the parties knew that a false and misleading certificate had been filed for the purpose of avoiding the rule of the New York Stock Exchange.

(d) Respondents did not renounce or return all profits they had received from Marcuse & Company.

1. The principal motive actuating most of the respondents in going into the new firm, was to secure payment of their debts against Von Frantzius & Company. Dividends paid respondents indicated there were substantial earnings distributed, 25 per cent of which were to be applied on debts to the Von Frantzius creditors. Respondents, as creditors of Von Frantzius, received a substantial part of the 25 per cent of the profits so applied and did not tender or return any part of the money they received as Von Frantzius creditors.

(e) Under no circumstances can Vette, Zuncker, Regensteiner, and the Studebakers avail themselves of Section 11.

1. The entire amount returned and tendered to the receiver was furnished by Hecht and Finn. The other respondents refused to contribute and have kept all profits they received from Marcuse & Company. They likewise refused to permit Hecht and Finn to renounce on their behalf further interest in the business, and made no such renunciation themselves.

IV.

THE LIMITED PARTNERSHIP HAVING FAILED, RESPONDENTS ARE GENERAL PARTNERS BOTH AT COMMON LAW AND UNDER THE UNIFORM GENERAL PARTNERSHIP ACT OF 1917.

(a) Section 6 of the Uniform General Partnership Act, effective July 1, 1917, defines a partnership as an association of two or more persons to carry on as co-owners a business for profit. This is a codification of the common law definition of partnership.

Meehan v. *Valentine*, 145 U. S. 611.

State Bank v. *Butler*, 149 Ill. 575.

(b) The respondents come squarely within this definition as they were carrying on as co-owners a business for profit.

(c) Section 7 of the Uniform General Partnership Act, which provides that persons who are not partners as to each other are not partners as to third persons, does not relieve respondents from liability.

1. The "intention" in ascertaining whether a partnership exists is the legal intention shown by the acts of the partners, and if the parties enter into a relationship to which the law attaches a partnership liability, they will be partners even amongst themselves, and certainly as to third persons whether they so intended or not.

Fougner v. *First National Bank*, 141 Ill. 124.

Meehan v. *Valentine*, 145 U. S. 611.

20 Ruling Case Law, p. 833.

30 Cyc. page 360.

2. Where parties attempt to form a limited partnership, but fail through non-compliance with the statute, they become general partners.

Henkel v. *Heyman*, 91 Ill. 96.

Manhattan Brass Co. v. *Allin*, 35 Ill. App. 336.

Walker v. *Wood*, 69 Ill. App. 542 (Aff. 170 Ill. 463).

19 A. & E. Enc. of Law, 2nd ed. pp. 339, 343, 353.

(c) Respondents did intend to become partners between themselves. They may have hoped or intended to become special partners, but they intended to enter into a partnership relation.

V.

George M. and Clement Studebaker Were Properly Held to be Partners.

(a) Marcuse, Brown and Hoffman all testified that the Studebakers, who were creditors of Von Frantzius & Company, agreed to contribute $50,000 to Marcuse & Company for the purpose of recovering the amount due them from Von Frantzius.

(b) Neither of the Studebakers testified otherwise, and the only testimony even inferentially in conflict with that of Marcuse, Brown and Hoffman, is the testimony of Buckingham that he told Marcuse the contribution would come from the Studebaker Brothers Trust. It is immaterial by whose check or from what source the Studebakers obtained the money they paid into the partnership.

(c) The Studebaker Brothers Trust was itself but a joint venture by which the two Studebakers had turned over part of their property to a trustee in which the entire control, management, and beneficial interest (except a certain compensation to Brown for his services) was reserved to the two Studebakers. In Illinois, joint ventures or stock companies of this character are nothing but partnerships.

> *People* v. *Brander,* 244 Ill. 26 and cases their cited.
>
> *Morse* v. *Richmond*, 97 Ill. 303.

ARGUMENT.

THE ORIGINAL PARTNERSHIP AGREEMENT SIGNED APRIL 2, 1917, THE SECOND PARTNERSHIP AGREEMENT SIGNED JUNE 30TH, AND THE SO-CALLED HECHT-[illegible]N TRUST SIGNED JUNE 30TH, ARE ALL PARTS OF THE SAME SCHEME AND TRANSACTION. ALL RESPONDENTS ARE EQUALLY BOUND.

The plan of Marcuse for building up a new partnership to take the place of Von Frantzius' brokerage house is best shown in the form of a certificate, dated February 1, 1917, he issued to several of the respondents. (Rec., 474.) In it Marcuse agrees, in consideration of the assignment to him of claims against the old firm, to settle the estate of Von Frantzius, to buy in the brokerage business formerly conducted by Von Frantzius, to organize a new brokerage firm to be composed of himself and others, to turn in the Von Frantzius assets to the new firm, to devote his entire time to the parnership, to issue certificates for the amounts due from Von Frantzius and to pay the certificates from the moneys and assets of the Von Frantzius estate and the profits of the new partnership. To do this and to start the new firm, he said he would need about $200,000 outside capital, and would himself, in addition thereto, make certain contributions of cash and stock exchange memberships to the new firm. It was further provided that the certificates be issued by Marcuse to take effect when he acquired, in the manner described, 80 per cent of the claims against the Von Frantzius estate. The certificates contained a provision that the holder of a certificate "expressly assents to all of the terms, conditions and provisions of this certificate."

The Partnership Agreement of April 2.

After Marcuse, in January and February, 1917, laid before the respondents his plan for forming the new partnership, negotiations proceeded to the point that a partnership agreement was dated and signed by Marcuse, Morris and all the respondents on April 2, 1917. In making this first partnership agreement Hoffman represented the two Studebakers and held their interests in his name. (Rec., 680.)

This first partnership agreement is summarized in the quotation from the opinion of the Circuit Court of Appeals in our statement of facts. That quotation states that in certain contingencies the special partners had the right to have the business liquidated. Those contingencies were that if auditors, designated by the special partners having contributed the majority of the capital, should certify that the business of the firm was not being conducted in a safe, conservative and judicious manner, the firm, at the option of a majority of the special partners, should be dissolved.

Had these partnership articles gone into effect and the statutory requirements been complied with, they would undoubtedly have constituted a valid limited partnership under the Illinois law of 1874.

The Amended Partnership Agreement of June 30th.

After the contract was signed Marcuse went to New York to see the New York Stock Exchange about admitting his firm to that exchange. He there learned that a firm with more than two limited partners, or with limited partners engaged in other business, could not be admitted to the Exchange. After he returned to Chicago he received a telegram dated May 8, 1917, to that

effect. (Rec., 262.) He reported to all the respondents this new obstacle and told them that the original partnership contract would have to be revised. (Rec., 454.)

The respondents (other than Hecht and Finn) take the position that the inchoate partnership of April 2nd was finally and definitely abondoned and that they had no part or share under the articles of partnership of June 30th. The courts below found otherwise and in a proceeding of this kind all possible facts, concerning which there is any evidence, must be resolved in favor of the decision of the District Court. We do not see how the claim can be here insisted upon that there was any definite change in plan of partnership, but as the respondents (other than Hecht and Finn) have always heretofore in the lower courts pressed the point that they were not interested as partners in the second parnership articles, we will here review some of that evidence on that point, with a view to showing that there was ample evidence to support the District Court in holding that there was only one plan embracing both sets of articles and that only the form of the papers were changed to circumvent the rules of the New York Stock Exchange.

Marcuse testified that when he returned from New York, he at once communicated to all the respondents and the various attorneys acting for them the obstacle that they had run against in the rule of the New York Stock Exchange. In his testimony, to which we are about to refer, he frequently mentions various attorneys to whom he spoke. Those attorneys were acting for the following parties:

Col. Foreman and Robertson were attorneys for Vette and Zuncker.
Sidney Stein was attorney for Marcuse and Finn.
Col. Buckingham and Hoffman were attorneys for the Studebakers.

Scott Brown was an attorney and Chicago manager of the business affairs of the Studebakers.
Louis Grollman was attorney for Regensteiner.

Marcuse, after stating that he communicated the contents of the telegram from the New York Stock Exchange to the other proposed partners and their attorneys and discussed this matter with them at various times, said (Rec., 457):

> "I told them that it was necessary—it had become necessary to reduce the number of special partners to two, and that Mr. Frank A. Hecht and Mr. Jos. M. Finn were willing to become the special partners * * * and that the firm would be permitted to become a regular firm after this arrangement had been completed and the contribution made by the balance of them."

The court then asked him if he told them that the New York Stock Exchange rule limited the number of special or limited partners to two and he answered "yes."

In response to a further inquiry from the court whether he told them anything else, he replied (Rec., 458):

> "Oh, I told him that we would conclude our partnership and go ahead just the same, and obviate the fact that we could show so many special partners by letting two of them assume the names of special partners for the others."

The witness said that shortly after his return from New York all the respondents and their attorneys met in the office of Col. Foreman and Mr. Stein then outlined the new proposition. As to what Stein told them at that time, Marcuse testified (Rec., 460):

> "He told them that the purpose of forming this partnership would not be changed by combining these partners into two special partners, and that it would—that it ought not to make any difference to any of them whether they would have carried

the name of special partners *openly* or contribute toward the fund."

Speaking of keeping the business going between the first partnership articles and perfecting the revised arrangements, he said:

"I don't know as I said it at this particular meeting, but I told them that I had acquired the lease, that I was paying the rent, that I was keeping the ticker in the office, and the board marker, and that I had bought the fixtures from the administrators and that I had acquired a contract to finish the office, the additional office, which had been taken by the former firm, and which had not been finished. The furniture was all under contract."

* * * * *

"Q. Now, did you ever tell Mr. Zuncker the original deal was off or the firm wouldn't go on and do business?

A. No. " (Rec., 462)

In the succeeding ten or fifteen pages of his testimony, Marcuse told about his consulting with respondents and their lawyers or representatives, and on page 470 he said:

"A. I told Mr. Vette and Mr. Zuncker—I told first their attorney—or may I correct that? I told Mr. Stein. I told Colonel Foreman and Mr. Robertson, and I told Vette and Zuncker when I saw them the same facts as I had told everyone of the original signers." * * *

"Q. What, if anything, did they or either of them say, Vette or Zuncker, to you?

A. They were satisfied." (Rec., 471.)

He had previously testified (Rec., 467):

"A. Mr. Scott Brown told me that he was satisfied to have Mr. Hecht represent their interests."

* * *

"Q. And was that in direct connection with the formation of the partnership and the Hecht-Finn Trust agreement?

A. Yes."

In answering an objection to the evidence just quoted, the court said (Rec., 471):

> "The Court: That is on this theory: Here are half a dozen men. There has been a shift in this arrangement. It has been established pretty clearly or, at least, *prima facie*, that their minds are harmonious on a certain program at a certain time, to accomplish a certain result. By reason of a circumstance intervening when he went to New York, there was a shift in that situation. This man came back here and he went around and talked to these various people, all of them. I think I will let the answer stand."

On the same page the witness said:

> "A. I told them that the firm as it stood today, as the contracts were signed up, would not be permitted to go ahead and do business as a firm, so far as the New York Exchange was concerned, and that I had to reorganize this firm, and that I had asked Mr. Hecht and Mr. Finn to act as special partners for all the others, if they were willing to contribute the same amount to that fund.
>
> Q. And what, if anything, did they say to that, and mention the name of the person who said it, please?
>
> A. That they were satisfied with Mr. Hecht and Mr. Finn as their representatives."

On cross-examination by Mr. Platt the witness testified that after his receipt of the telegram from the New York Stock Exchange he communicated in substance the contents of that telegram to each of the men who had signed the April 2nd agreement and to each of the persons who had acted as attorneys for any of those men in connection with the negotiations, and that neither in any of the conferences that he had with any of the men who had signed the April 2nd agreement as special partners, nor with any of the attorneys who represented them, was there ever given any reason for the difference between the contract of April 2nd and the contracts of

June 30th other than the receipt of the telegram from the New York Stock Exchange and its communication to his associates. (Rec., 496)

All the respondents, including the Studebakers, assigned their claims against the Von Frantzius estate to Marcuse, a necessary preliminary. (Rec., 473)

All the respondents, or their attorneys, met on June 30th in the brokerage office and there handed in their checks which were at once endorsed and handed over to Marcuse. (Rec., 488-9.)

The respondents other than Marcuse likewise testified that the rule of the New York Stock Exchange was the only reason for changing the form of the partnership articles.

Finn, one of the respondents, testified that he was told by Marcuse that the New York Stock Exchange

> "would not permit as many special partners as there was originally intended, and on that account they asked me if I would act as a special partner; that Mr. Hecht—I was told at the time that Mr. Hecht was willing to do so, and that the other special partners would enter into an arrangement through what would be known as the Finn-Hecht Trust, which would bind them to us in the same manner as if they would be special partners. That was my understanding at the time." (Rec., 257.)

And further (Rec., 688):

> "Q. let me ask you, what is your recollection as to the reason why this document, a copy of which I am calling to your attention with the last page indicating that the signatures were torn off, why wasn't that allowed to stand as the final agreement between the partners?
>
> A. The way I understand it was because the New York Stock Exchange notified—we were notified by the New York Stock Exchange that only two limited partners would be permitted, and Mr. Hecht said

he was willing and, after a great deal of persuasion, I finally, unfortunately, decided to sign.

Q. Was there any other reason why Mr. Hoffman and Mr. Regensteiner and Zuncker and Vette weren't in there as limited partners just as you and Hecht were?

A. None whatever.

Q. Except that rule of the New York Stock Exchange?

A. None whatever, that is the only reason."

Zuncker, one of the respondents, testified (Rec., 379-80) that the reason the agreement of April 2nd did not go through was on account of the rule of the New York Stock Exchange, and that he could not remember any other reason why the agreement of April 2nd was not carried out.

Regensteiner, one of the respondents, testified (Rec., 428) that he understood that the rule of the New York Stock Exchange prevented the respondents from becoming partners openly, and "it was agreed that Mr. Finn and Mr. Hecht would be the special partners," in the articles of June 30, but that he did not understand that Hecht and Finn thereby acquired any advantage over him.

> "Q. Am I correct in my understanding that you understood that their names were used in that connection instead of all your names being used, because the New York Stock Exchange rules wouldn't let all your names be used?
>
> A. I think that was the understanding. * * *
>
> Q. That they were picked to represent the rest of you men, including themselves, because the rule would not permit all of you to have your names appear, is that true?
>
> A. That is my recollection." (Rec., 428)
>
> * * * * *
>
> "Q. That those two men stood there in a representative capacity for themselves and you and Hoffman and Vette and Zuncker?

A. That is the way I understood it.
Q. That is the way you understood it?
A. Yes, yes." (Rec., 429.)

Hoffman testified that he recollected that the rule of the New York Stock Exchange was one of the reasons for changing the partnership articles and he thought there were others but could not recall what any of the others were. (Rec., 683.)

He further testified (Rec., 683):

> "It was our desire to become limited partners, if that served the purpose of recovering our claim against the Von Frantzius estate, yes."

Hoffman, who represented the Studebakers, testified that the Studebakers had been customers of the Von Frantzius firm and said (Rec., 674):

> "The idea that was promulgated by Mr. Marcuse was that if he could take over the assets of Von Frantzius and develop the business based on those assets, he could make a paying business out of it, a brokerage business, and in that way make enough money to pay off the claims against the Von Frantzius Estate in full. We were interested in having our claim paid in full, and, therefore, we were interested in Mr. Marcuse's suggestion. The result of those negotiations was the Hecht-Finn Trust; in other words, a trust under which the special partners, with Mr. Marcuse and Mr. Morris, should pay—should divide or should pay certain sums to certificate holders under that trust.
>
> Q. Now, you mean when you say special partners—
>
> A. Messrs. Hecht and Finn."
>
> * * * * *
>
> "Q. Studebaker Brothers, what was their interest?
>
> A. The protection of their claim against the Von Frantzius estate. Possibly they would make it in full. (Rec., 675.)"
>
> "Q. I want you to tell me whether or not you then understand that Hecht and Finn were in any different relationship, or had any different responsi-

bility, than you and Regensteiner and Vette and Zuncker had under this agreement which finally went into effect.

A. My understanding was that *their liability would not be any different.*" (Rec., 687.)

Counsel for two of the respondents, Finn and Hecht, insisted in the Court of Appeals that the agreement signed June 30th carried out with slight alteration the original plan of April 2nd. The testimony of Finn was taken and bears out that contention. Hecht was sick at the time of the hearing and did not testify but his counsel insisted in the Court of Appeals that one general plan covered the agreement signed on April 2nd and June 30th.

Some of the other respondents offered some oral testimony claiming that there was a complete abandonment of the partnership contemplated by the articles signed April 2nd, and that the agreement of June 30th brought about a scheme entirely new and without any relation to the plan existing on April 2nd.

The two Studebakers, respondents, did not testify but their counsel, Mr. Buckingham, testified (Rec., 552, et. seq.) that he told Stein, the attorney for Marcuse, that he was opposed to any partnership, general or limited, and insisted that they would only put in their $50,000 upon some trust agreement; that he revised the trust agreement called the Hecht-Finn agreement, that he put into it that the Studebakers were not to be considered partners, and that he approved the Hecht-Finn agreement as drawn.

Robertson, attorney for Vette and Zuncker, state that he heard Buckingham make the aforesaid statement about the Studebakers, and Hoffman, of Buckingham's office, and Grollman, attorney for Regensteiner, also testified to the same effect as Robertson.

One of the strongest proofs in the record that all these respondents never wavered from April 1st until after June 30th in their intention to form a limited partnership and to be all actually or by representation members of the partnership appears in exhibits marked "Hecht Exhibits 2, 3, 4 and 5" appearing on pages 665 to 670 of the record.

Hecht Exhibit 3 dated March 28, 1917, between Marcuse and Zuncker, and evidently made in anticipation of signing the partnership articles of April 2nd, recites that whereas Zuncker has agreed to be a special partner in Marcuse & Co., Marcuse agrees that at the expiration of one year from the partnership agreement he will, upon request of Zuncker, take the investment off Zuncker's hands and return him his $25,000 in cash together with interest and a certain amount of profits; and further that after the termination of the partnership then to be formed (it was limited to five years) if Marcuse continued in the brokerage business and Zuncker so desired, he might invest a like sum of $25,000 in any future brokerage firm carried on by Marcuse.

Hecht Exhibit 4 (Rec., 667) dated June 30th. between the same parties recites that whereas a partnership had just been formed and Hecht and Finn had executed a certain declaration of trust whereby they covenanted and agreed

> "to hold *their interest* as said special partners *in trust ratably for the holders* of certain trust certificates, according to the terms of said declaration of trust,"

and Zuncker had agreed to put $25,000 into the trust, Marcuse agreed that after April 1, 1918, upon Zuncker's request, he would repay to Zuncker the $25,000 together with interest and certain profits and would "indemnify

and save harmless Zuncker against any and all *liability* on account of any *obligations of Marcuse & Company:*" and Marcuse agreed that after the termination of the partnership then entered into if Marcuse continued in the brokerage business, Zuncker should have the option of contributing $25,000 to the future firm and should share in its profits. This document puts the articles signed June 30th on exactly the same footing as those signed on April 2nd.

Exhibit 2 (Rec., 665) is an agreement dated March 28, 1917, between Marcuse and Vette, is similar to the agreement made by Marcus with Juncker on that date and was evidently made in contemplation of the partnership agreement signed on April 2nd.

Exhibit 5 (Rec., 668) is an agreement dated July 1st (changed to June 30th) 1917, between Marcuse and Vette similar to Exhibit 4, and evidently was made in connection with the partnership articles which were signed on June 30th.

Nothing could more conclusively show than do these four exhibits that the respondents named were to have the same relation to the firm created by the partnership articles signed June 30th as they had by the articles of partnership signed April 2nd. It would be hard to imagine a declaration made for the very purpose that would show more conclusively that all parties intended that these respondents should have the same relation to the enterprise under the articles signed June 30th that they would have had under the articles signed April 2nd, if the latter had been carried into operation.

The articles signed April 2nd, with the accompanying documents showing the additional privileges to be given respondents by Marcuse in connection with future business, and the articles signed June 30th with like accom-

panying documents and with the Hecht-Finn Trust agreement restoring to all the respondents, other than Hecht and Finn, all the rights they had under the articles signed April 2nd, show conclusively that the relations of all the respondents to Marcuse & Company were to be the same under the articles signed on April 2nd and on June 30th. Any oral testimony in support of such position seems superfluous. Any oral testimony in opposition to such position can have little weight. The documents referred to leave no place for oral testimony.

The signatures of all the respondents to the contract signed on April 2nd appear mutilated (Rec., 275), and this was shown, by oral testimony, to have been done about July 11th *after* the second partnership agreement had been signed on June 30th. In other words, the continuity of the whole transaction is shown by the fact that the signatures to the first contract were not canceled until the second contract had been signed.

The strongest evidence, however, that the two partnership agreements were made to carry out a single purpose appears from a comparison of them. The purpose is exactly the same. We can also say that the parties were, in substance, the same. Morris and Marcuse with all the respondents were parties to the first agreement; Morris and Marcuse with Hecht and Finn representing themselves and the rest of the respondents, were the parties to the second agreement. Under the first agreement the contributions of the seven respondents aggregated $190,000; under the second agreement the contributions of Hecht and Finn aggregated exactly the same amount. The other provisions of the second partnership agreement relating to the contributions of Marcuse and Morris; payment to the partners of 6 per cent on their investment; segregation of 25 per cent of the profits to pay the creditors of Von Frantzius; the division of the

net profits between all the partners; sharing in losses; the provisions concerning the keeping of books; access thereto; statements, trial balances; declaring dividends; the appointment of auditors; the dissolution of partnership on the certificate of auditors; that the death of none of the partners except Marcuse should work a dissolution of the partnership and in case of liquidation a liquidator be appointed by the special partners, or on their failing so to do the Chicago Title & Trust Co. to liquidate; are all exactly the same as in the first agreement. The differences are only such as were necessitated by reducing the special partners from seven to two.

Another document, however, was necessary in order to evidence the rights of respondents, other than Hecht and Finn, who were in fact contributing the major part of the new firm's capital. This led to the preparation and execution contemporaneously with the second partnership agreement of the third important document.

The Hecht-Finn Agreement.

The third of the principal documents to be considered in this case, the Hecht-Finn Trust, so called, confirms the position we have taken. It is not a trust at all; it was not intended to be a trust. It is, if anything, a declaration of distrust. Under the articles signed April 2nd there would be paid directly to the limited partners their dividends from the firm; they had the right of inspection of books and the appointment of auditors, and the right to dissolve the partnership and wind up its affairs if the auditors reported to them that things were not being carried on properly. It was impossible to put these provisions in the articles signed June 30th, for such provisions would have disclosed at once to the New York Stock Exchange that there were more than two lim-

ited partners in the firm. Under the articles signed June 30th considered alone, Hecht and Finn, although contributing less than one-third of the capital supplied by limited partners, would have a right to draw all dividends and all distribution of capital. They alone would have had the right to inspect the books, appoint auditors and if necessary wind up the partnership.

The other respondents were evidently unwilling to trust Hecht and Finn with these powers and the right to draw all dividends and then distribute them to the other respondents. Therefore, on account of that distrust the Hecht-Finn agreement was made. It provides that all distributions of dividends or capital, including those going to Hecht and Finn, should be paid to the Chicago Title & Trust Company, and by it disbursed to the respondents in proportion to their contributions to the firm.

Its purpose was to restore to respondents (other than Hecht and Finn) all the rights and privileges they would have had under the first articles had it not been necessary to revise them. It accomplished that purpose. It restored every right, duty and liability omitted from the second articles in the very phraseology of the first articles.

It will be impossible for respondents to point out a single substantial right that the special partners had under the first articles, that they did not have under the second articles, supplemented by the Hecht-Finn agreement, the latter being consented to by Marcuse and Morris.

The checks for contributions made by the respondents other than Hecht and Finn were made payable to Hecht and Finn, but in the presence of the other contributors were immediately endorsed over to Marcuse & Company.

Hecht and Finn never had any power over any income or fund; they were not to collect dividends or receive back the limited partnership capital upon dissolution; they were not to have any powers whatsoever in connection with the firm that the others did not have; they were not to receive or disburse any money. In fact, there was not given to them under the Hecht-Finn agreement a single trust power over either principal, interest or dividends.

All talk concerning trust and trusts, all citations regarding trusts, all discussion of relative rights of trustees and *cestui que trust* are as far as possible from being in point or applicable to the relation of these seven special partners. Hecht and Finn were the *representatives* of petitioners in this enterprise, but not trustees.

Under these circumstances with all these matters before it, the District Court held as follows (Rec., 689):

> "The Court: I am prepared to announce a conclusion in this matter that has been submitted, not in the form, considering its highly important and interesting nature, I would like to make it in. However, it is more important that the conclusion should be announced than it is for a district judge to write a long and labored opinion.
>
> The conclusion is that the so-called 'special partners' are all general partners; that these so-called 'special partners,' selected,—all of them selected Hecht and Finn as the agents for the operation of the special partnership by and through Hecht and Finn; that Hecht and Finn, in fact, were Hecht and Finn, Vette, * * * Regensteiner, the Hecht-Finn Trust, the Studebaker Trust as Clement and George Studebaker; that that is what Hecht-Finn were. They were all of these people; and that under the laws of the State of Illinois that thing was not a special partnership, but it was, by the law of the State of Illinois, a general,—member of a general partnership, by reason of the failure to comply with the Illinois statute specifying the steps, and prescribing the route to be taken to constitute a limited

partnership, which, as I have announced before, it was my view had to be obeyed to accomplish that end, but which in this case was not done in any essential particular."

In referring to this point, the Court of Appeals in the ruling opinion said:

"There was evidence from which the District Court could have reached this conclusion, and doubtless it did so conclude, and such conclusion of fact, reached upon contradictory evidence, we may not disturb in this proceeding to review and revise as to the law."

In the dissenting opinion, referring to the petition to review and revise, it is said:

"Only questions of law are therefore presented. *In re Hoyne, Bankrupt* (C. C. A.) 277 Fed. 668. On this record we can consider but one question: Is there any evidence to support the conclusion of the District Judge?

The District Judge failed to make specific findings of fact, but we must assume that such findings as were essential or might be necessary to support his conclusions were by him found in favor of respondents. His conclusion that petitioners were general partners makes such a position unavoidable. * * * If there is any evidence in the record to support the position of the respondents, we must accept it as established. *In re Hoyne, Bankrupt, supra.* Nor are respondents limited upon this inquiry to direct evidence. Their position may find support in the inferences fairly deducible from the established facts." (281 Fed. 941.)

It is submitted that two of the respondents, Hecht and Finn, joined the partnership created by the articles signed June 30th. Upon the above state of the record, we think it indisputable that the other five respondents, Vette, Zuncker, Regensteiner, and the two Studebakers (represented by Hoffman) bear the same relation to that partnership as did Hecht and Finn who represented the others.

We have above discussed at length the relations of these parties to the partnership because it was strenuously insisted, both in the record and in the briefs filed in opposition to the petition for *certiorari,* that of the respondents, only Hecht and Finn became partners, and that the so-called Hecht-Finn agreement instead of joining them more firmly to the partnership, rose as a barrier to keep them out of the partnership and leave them free from liabilities that Hecht and Finn incurred.

The Court of Appeals in both its opinions treated all the respondents as incurring the same liability and as being all partners under the agreement signed June 30th, but the controlling opinion allows them to escape liability because of two or three provisions of the Illinois Uniform Partnership Acts, which did not go into force until July 1st.

II.

THE ATTEMPT TO FORM A LIMITED PARTNERSHIP UNDER THE ILLINOIS ACT OF 1874 FAILED, AND NO LIMITED PARTNERSHIP WAS EVER FORMED.

All proceedings for the formation of this limited partnership were taken under the Illinois limited partnership law of 1874, which permitted the formation of a limited partnership to carry on a brokerage business if certain required steps were taken, particularly the making and acknowledging of a statement or certificate by all the partners showing the names of all special partners or persons interested in the firm, the amount of contribution by each special partner and that all such contributions were actually paid in, and the *filing of such certificate* in the office of the county clerk of the county in which was the principal place of business of the proposed firm.

Section 8 of that Limited Partnership Act is:

> "SECTION 8. No such partnership shall be deemed to have been formed *until such certificate*, acknowledgment and affidavit *shall have been filed* as above directed; and if *any false statement* shall be made in such certificate or affidavit, *all* the persons interested in such partnership shall be liable for all the engagements thereof, *as general partners*."

In 1917 Illinois adopted the Uniform Partnership Act and the Uniform Limited Partnership Act, changing materially the partnership law of Illinois. The new acts took effect on July 1, 1917, the old act expiring with June 30th.

The certificate referred to above, required by the Act of 1874, was not recorded until July 2nd after the act under which it was recorded had been repealed. No attempt was ever made to comply with the new limited partnership act, and it was practically conceded by counsel for respondents, and it is stated in the ruling opinion of the Court of Appeals that this partnership was not completely formed as a limited partnership under either the 1874 or 1917 act.

It is our position that no special or limited partnership was formed under the Illinois Act of 1874 because:

(a) The Act of 1874 under which it was attempted to form the limited partnership and the only Illinois act under which a limited partnership to conduct a brokerage business could be formed, was repealed prior to the filing of the necessary certificate.

(b) There were intentional false statements of material matters made in the certificate which was prepared and filed.

(c) No limited partnership for *brokerage* purposes could be formed under the Illinois Uniform Limited Partnership Act which took effect July 1, 1917.

(a) The Act of 1874 was repealed prior to the filing of the necessary certificate.

The District Court found, and both opinions of the Court of Appeals proceed on the assumption that the effort to form a limited partnership failed. No other conclusion could have been reached.

An attempt was made to form the limited partnership under the act of 1874. The statutory certificate which was signed and filed, recited (Rec., 461):

> "This is to certify that the undersigned, Ben Marcuse, L. H. Morris, Frank A. Hecht and Joseph M. Finn, being desirous of forming a limited partnership *under provisions* of an Act of the General Assembly of State of Illinois entitled, 'An Act to Revise the Law in Relation to Limited Partnerships,' approved March 18, 1874, in force July 1, 1874, do hereby certify," etc.

This certificate was filed July 2, 1917, and only purported to give the limited data required by the act of 1874, not the much fuller disclosure required by the act of 1917. The certificate was *filed in the office of the county clerk* as required by the act of 1874, not *recorded in the office of the county recorder* as required by the act of 1917.

On June 30, 1917, the act of 1874 expired, except as to limited partnerships then in existence. This limited partnership had not been completed prior to that repeal.

The certificate, acknowledgment and affidavit were not filed until July 2nd. The final and vital element, therefore, in forming a limited partnership under the act of 1874 did not take place until that act had been repealed.

(b) Had the certificate been filed in time under the Act of 1874, respondents would still have been liable as general partners because of the false statements in the certificate and the failure of some of the limited partners to sign that certificate.

The act of 1874 provides (Sec. 4):

> "The persons desirous of forming such partnership shall make and *severally* sign a certificate which shall contain 1, * * *; 2, * * * ; 3, *the names of the general and special partners* therein, distinguishing which are general and which are special partners, and their respective places of residence; 4. The amount of capital stock which *each special partner* shall have contributed to the common stock."

The essential feature of this certificate, designed for the information and protection of creditors, is that *the names* of the special partners shall be disclosed, the amount of the *contribution of each special partner be disclosed* and that this certificate shall be signed and acknowledged *by each* of the special partners. To avoid the rule of the New York Stock Exchange, but with the effect of concealing this essential information from creditors, the certificate filed did not disclose the contributions to the partnership fund made by Vette, Zuncker, Regensteiner and the Studebakers or their connection with the organization. It was not signed by them.

These men were all partners and every right secured to all the special partners under the first partnership agreement was preserved to them under the second and third agreements. They made the same contributions to the capital, were entitled to the same proportion of the profits, bore the same proportion of losses, and had the same right to inspect the books, appoint auditors and

dissolve the partnership as was given them in the first document.

The so-called Hecht-Finn trust, with the articles signed June 30th attached as an exhibit, simply emphasizes the fact that the firm which finally engaged in business was the firm arranged for in February, sought to be formed in April and finally formed in June and July.

No money was paid by any respondent to Hecht and Finn. On Saturday morning, June 30th, the contributors in person or by their counsel met in the office of Marcuse & Co. and handed in checks for the amount of their respective contributions. (Rec., 340, *et seq.*, 245-248.) They laid their checks on the table. The checks of Hecht and Finn were for their contributions as provided by the first partnership agreement. The checks of the other contributors were for the amount of their contributions according to the first agreement. The latter checks were drawn to the order of Hecht and Finn but were at once endorsed by them and laid with the other checks on the table. (Rec., 247-250, 341.)

Zuncker concedes (Rec., 384) that he paid $25,000 into the Hecht-Finn trust and supposed it went to Marcuse & Company. Marcuse testified that he talked with the two Studebakers and that they told him that they would put $50,000 into the enterprise and referred him to Scott Brown or Hoffman for details. On the 30th of June, Hoffman (for the Studebakers) was present with the $50,000 check. Robertson was present as the representative of Vette and Zuncker and said that he would not have delivered their $55,000 into the fund unless all of the $190,000 went in at the same time. (Rec., 627.)

The money passed directly from respondents to the partnership account.

Therefore, on June 30th, each of the respondents,

present in person or by attorney at the meeting when the certificate was made, knew that that certificate was purposely made false in two most important particulars—the names of the special partners and the amounts contributed by them; and it was not *"severally"* signed by each of the special partners.

On December 1, 1918, Marcuse & Co. declared an extra or special dividend of 4 per cent. Checks for this dividend were mailed by Marcuse & Co. direct to all the special partners or credited to their trading accounts and so accepted by them, with the exception of the Studebakers, who returned their checks, requesting that they be made payable to the Chicago Title & Trust Co., which was done. (Rec., 523.)

The District Court found and the Court of Appeals opinions proceed on the assumption that the purpose of making the change in the form of the original partnership agreement was to avoid the rule of the New York Stock Exchange. Section 8 of the 1874 act provides:

> "and if any false statement shall be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof *as general partners.*"

This is an Illinois statute and the Illinois courts have construed it that failure to give correct information required by the act renders all parties liable *as general partners.*

In *Cummings* v. *Hayes,* 100 Ill. App. 347, the court held all the members of an attempted limited partnership liable as general partners because one of them had signed the statutory certificate by an attorney, and said (pp. 353-4):

> "The provision of the statute authorizing limited partnerships must be substantially complied with, or those who associated under it will be liable as general partners. *Henkel* v. *Heyman,* 91 Ill. 96.

Such portions of the statute as look to the protection of persons dealing with the firm, are, in favor of the public, to be liberally construed, and must be strictly observed by the partners. *Smith* v. *Argall,* 6 Hill, 479; *Argall* v. *Smith,* 3 Denio, 435; *Haggerty* v. *Foster,* 103 Mass. 17-19; *Maloney* v. *Bruce,* 94 Pa. State, 249; *Lachaise* v. *Marks,* 4 E. D. Smith, 610-626; *Fox* v. *Graham, Michigan Nisi Prius Cases,* 90; *Durant* v. *Abendroth,* 69 N. Y. 148.

What portions of the statutes are designed for the protection of those who may deal with the firm? Manifestly, the statements of capital contributed by the special partners, the duration of the partnership, *the names of the parties, and certainty as to their assent thereto.*"

* * * * *

"* * * The certificate filed in the [illegible]ce of the clerk of the county, to be by him recorded in a book and kept subject to inspection by all persons, *must be such that therefrom, and without outside inquiry or examination, it can be determined with certainty whom the parties forming such limited partnership are, and that each of them has joined therein and assented thereto.*"

In 20 Ruling Case Law, p. 1065, it is said:

"And good faith and an honest intention to comply with the statute will not protect the special partner nor need a creditor prove that he has been injured by a failure to comply with the statute."

Buckley v. *Lord et al.* 24 How. Prac. 455, is a well considered case directly in point. In that case, Lord, Brown and Marks agreed to form a limited partnership in which Lord and Brown were to be general partners, and Marks a limited partner. Marks was to contribute $20,000 in cash. As a matter of fact, Bramhall contributed $8,000 of the $20,000 paid in by Marks and had an agreement with him whereby Marks was to pay Bramhall two-fifths of all profits and on dissolution two-fifths of the principal received by Marks from the partnership. The

general partners knew of this arrangement and the partnership article provided that Bramhall because of the interest he had manifested in the welfare might at all times examine into its business affairs. The certificate required to be filed said nothing about Bramhall, and stated that the $20,000 was furnished by Marks. The court held both Marks and Bramhall general partners, and said:

> "He sought to secure the right and all the benefit of a special partner without becoming one, and thereby *made himself a general partner*. He is made so by the operation of the statute, which declares that all persons interested in the partnership shall be liable as general partners if any false statement is made in the certificate or affidavit by which the limited copartnership is formed."

The *Buckley* case is strictly analogous to the case at bar, and the principle of it is emphasized instead of discredited by *Crehan* v. *Megargel*, 234 N. Y. 67, although the latter case was cited by our opponents in reply to the petition for a writ of certiorari. A careful consideration of the *Crehan* case shows, however, that while in that case outside parties contributed part of the special capital through a trustee, they were to have no right to supervise or take part in the affairs of the partnership. They were expressly excluded from any control over the partnership, or over the special funds put into it, and the court reached the conclusion that the outside contributors were not liable, largely on account of this express exclusion from taking part in the management, and stated that it was not in any way criticizing or departing from the *Buckley* case. There are one or two dictums in the *Crehan* case, out of which much was attempted to be made, but we insist that a careful consideration of the two cases shows that the *Buckley* case is

exactly analogous to the case at bar, and the *Crehan* case is not in point.

In the *Buckley* case the rights of a special partner were reserved to Bramhall; in the *Crehan* case they were not reserved to the contributors.

The rights of a special partner are to share in the profits and pay his proportion of the losses; to examine into the partnership affairs; to require an accounting; to bring suit under certain conditions to dissolve the partnership or to protect his rights. (Hurd's Ill. Rev. Stat. 1915-1916, Ch. 84, Secs. 15, 19 and 20.)

The Hecht-Finn agreement provides that profits and losses are to be borne in proportion to the respondents' contributions; that respondents shall have access to the books of account and be furnished with monthly reports, an annual inventory and monthly balance sheets; that they may appoint auditors for the firm, and that they may, under certain conditions, bring suit to dissolve the partnership.

Therefore, every statutory and legal right (and more) of a special partner was given to each respondent.

So far as we can find, all special partnership statutes, and especially the Uniform Limited Partnership Act, have similar provisions requiring that the certificate and affidavit to be filed shall give the *names* of the special partners and the *amount* each contributes. The Uniform Act requires also the *residence* of the special partners be disclosed. If only the amount is material, why call for the names? If names and amounts are required, they surely must be the true names and the true amounts.

There is ample reason (if reason is needed) why true names and amounts are required. If, for instance, the certifiicate is false as to the amount, the creditors are entitled to know who are the special partners and to

whom they may resort for payment. They are entitled to this information *on the face of the papers* and should not be required to seek it elsewhere.

Limited partners have all the advantage of the limited liability of a corporate organization without any of the customary statutory restrictions on corporations and corporate powers. They should, therefore, in good faith, and without evasion, give the information required by the statute in the recorded certificate.

(c) No limited partnership for brokerage purposes could be formed under the Illinois Uniform Limited Partnership Act, which took effect July 1, 1917.

Section 3 of that act is:

> "A limited partnership may carry on any business which a partnership without limited partners may carry on, except banking, insurance, brokerage and the operation of railroads."

This section is too plain to call for construction. It is in line with the Illinois statutes and the statutes of other states, most of which provide separate statutes for banking, insurance and the operation of railroads.

The laws of Illinois do not permit the incorporation of a company to carry on a brokerage business. They forbid the creation of a limited firm for that purpose. Such a business calls for great trust on the part of those dealing with a brokerage house. It is akin to banking. Illinois evidently resolved that any person engaging in a brokerage business should do so at the risk of his entire fortune. He and not his customers should suffer.

Such a policy on the part of the state is abundantly justified by the results in the case at bar. The capital put into the business was $190,000 from the special partners, $10,000 from Morris, $60,000 from Marcuse, a New York Stock Exchange membership worth $68,000

and a Chicago Stock Exchange membership worth $2,000, or a total of $330,000. In three months, on September 30, 1917, it reached a business involving $4,272,830.04. (Rec., 510.)

From a tentative report of the receiver it appears that there are about 700 creditors and that, according to the Marcuse books, liabilities exceeded assets by about $1,729,640.73. (Rec., 716.) This report lists as assets $853,313.96 due from customers on unsecured accounts which item the receiver states is of doubtful value. Excluding this item, and allowing for the usual shrinkage in assets and increase in liabilities there is probably a deficit considerably in excess of $2,500,000. This indicates a loss at about the rate of $76,000 a month. At this rate, in four months, the firm's capital was gone and it was conducting business on its depositors' money. The receiver's tentative report shows not only hopeless insolvency but that only a small portion of the securities supposedly purchased and held for customers were on hand at the time of the appointment of the receiver, and that the same was true, but to a less extent, of the securities received from customers as margin deposits. (Rec., 716.)

Is it any wonder that the Illinois Uniform Limited Partnership Act refuses to permit a brokerage business to be carried on by a limited partnership and that Illinois refuses to permit a corporation to be formed to carry on such a business, and thus requires unlimited personal liability on the part of those engaging in such business?

The new Illinois Uniform Limited Partnership Act provides for limited partnerships, existing under the 1874 Act, qualifying under the new Uniform Act by filing new certificates, affidavits, statements, etc. That provision, however, cannot relate to brokerage partner-

ships for they cannot be organized under the new act. However, no attempt was made by respondents to comply with the new limited Partnership Act.

If the above situation was in any way affected by the new legislation, it was to leave the firm a general partnership under the new acts. This partnership under either the Act of 1874 or of 1917 was a general partnership.

Respondents, by their own deliberate acts, rendered themselves liable as general partners.

There is little dispute up to the present point between us and the ruling opinion of the Court of Appeals, for as before said, that opinion simply sustains a defense of confession and avoidance.

III.

SECTION 11 OF THE UNIFORM LIMITED PARTNERSHIP ACT HAS NO APPLICATION.

As there is no serious contention in the record that a limited partnership was formed either under the Act of 1874, or under the Uniform Limited Partnership Act of Illinois, and as no attempt was made to conform in any way to the new act and because it expressly provides that no brokerage business can be carried on under it, the defense is largely a confession and avoidance based on two theories:

First, that respondents are freed from partnership liability by Section 11 of the new Illinois limited act, which provides that where partners thereunder "erroneously believe" that they are members of a limited partnership, and upon learning they are not limited partners, promptly renounce their interest in the profits of the

business, they shall not be held liable as general partners; and,

Second, that as respondents did not become limited partners under the old act and did not become limited partners under the new limited act, and did not intend to be general partners, therefore, under Sections 6 and 7 of the Illinois Uniform General Partnership Act, they were not partners at all and cannot be held liable as partners in any way or to any extent.

The principal part of the controlling opinion of the Court of Appeals is based on Section 11 of the Illinois Uniform Limited Partnership Act. On that section respondents rested their first and principal defense. That section is:

> "A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income."

It was principally on this section that the Court of Appeals freed all of the respondents from liability. The construction put upon it by that court is most important, and because it is a strained construction will probably not be followed by the state courts.

The evidence showed that the partnership continued active nearly three years, became insolvent and was thrown into bankruptcy; that shortly thereafter Hecht and Finn tendered or paid to the receiver $46,000, claiming that to be [illegible] profits or dividends that had been distributed to all seven of respondents and claimed im-

munity under Section 11. It was also shown (Rec., 658-661) that the other five respondents declined to participate in the tender, disclaimed any necessity of returning profits and refused to allow Hecht and Finn to tender the return of profits or to make a renunciation of interest *in their name or on their behalf.* They claimed they were not special partners. This is also stated in both opinions of the Court of Appeals.

We insist that the limited partnership was sought to be created under the old law; that nothing was ever done under the new law; that a limited partnership for brokerage could not act under the new law; that Section 11 of the new act did not apply to a partnership formed under the old act and especially not to a brokerage business, as the new act excluded that business, and that in any event Section 30 of the Unifrom Limited Partnership Act expressly provided that until a limited partnership under any other act complied with the provisions of the new act, it should be governed entirely by the provisions of the old act.

Section 11 is new. It does not occur in any prior limited partnership act. Was it the intention that this section should apply to limited partnerships then in existence, formed under prior statute? Especially was it intended to apply to limited partnerships formed under prior acts to conduct a business expressly prohibited by the new limited act? Or was it intended to apply only to partnerships authorized and formed under the act in which it appears?

The heading of the first section of the Illinois Unifrom Limited Partnership Act is "What Constitutes Limited Partnership—Liabilities." That section then continues:

> "A limited partnership is a partnership formed by two or more persons under the provisions of Section 2." * * *

Section 2 referred to must be Section 2 of that act. When "limited partnership" is subsequently used it is used, without qualification, in the sense defined by the act.

In the light of this definition, we turn to Section 11. The first part of it is:

> "A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership is not," etc.

What is meant here by "limited partnership"? Obviously a limited partnership *as previously defined*, that is, a limited partnership formed under Section 2 of that act. To hold otherwise is to ignore the definition of "limited partnership," in the act itself.

If the words "limited partnership" and "limited partner" as used in Section 11, were not intended to refer only to limited partnerships and a limited partner in a limited partnership formed under the provisions of that statute, then these words, when used without qualification in other sections of the Limited Partnership Act may likewise be construed as applicable to limited partnerships and limited partners under the Act of 1874.

For instance, Section 3 of the Uniform Limited Partnership Act provides "A limited partnership may carry on any business which a partnership without limited partners may carry on except banking, insurance, brokerage and the operation of railroads."

If "limited partnership" as used in section 11 does not refer only to limited partnerships formed under the Uniform Act, then likewise "limited partnership" as used in section 3 does not refer only to limited partnerships formed under that act, and section 3 must likewise be construed as an amendment of the prior act and to

prohibit limited partnerships formed under the prior act from carrying on a brokerage business.

We can go through the Uniform Limited Partnership Act, section after section and in almost every section the words "limited partner" or "limited partnership" are used without further qualification, and if when used in Section 11 they apply to limited partners and limited partnerships formed under the prior act, then in each other section of the Uniform Partnership Act those words must be construed also to apply to limited partnerships and limited partners formed under the prior act.

Instead, therefore, of the Uniform Partnership Act being a carefully constructed statute complete within itself, it must be construed only as an amendment to the prior statute and the prior statute interwoven with it in determining the rights and liabilities of limited partners.

As if to prevent any possible misconception of the Uniform Act being construed as merely an amendment to prior acts, the Uniform Act expressly covers the situation.

Section 30 of the Uniform Act is entitled: "Provisions for Existing Limited Partnership." Sections (1) and (2) are:

> "(1) A limited partnership formed under any statute of this state prior to the adoption of this act, may become a limited partnership under this act by complying with the provisions of Section 2; provided the certificate sets forth, etc." * * *
>
> "(2) A limited partnership formed under any statute of this state prior to the adoption of this act, until or unless it becomes a limited partnership under this act, shall continue to be governed by the provisions of an act entitled, 'An Act to revise the law in relation to limited partnerships,' approved March 18, 1874, in force July 1, 1874, except that

such partnerships shall not be renewed unless so provided in the original agreement."

In other words, the new act has certain substantial burdens that the old act did not have, for instance, much fuller disclosures. It has certain substantial benefits the old act did not give, for instance, section 11. Until any limited partnership formed under the old act assumes the burdens of the new act, *it continues to be governed by the provisions of the old act.*

Section 30 is very explicit on this point. It requires a certificate complying with the elaborate disclosures called for by section 2 of the new act and also a certificate of the firm's financial condition. It calls particularly for the amount of the original contribution of each limited partner. There is no pretense that any such steps were taken, and until then a limited partnership formed under a prior law "shall continue to be governed by the provisions of" the Act of 1874.

The construction given section 11 by the Court of Appeals entirely disregards or annuls section 30 and holds section 11 to be in effect an amendment to the old act, and that a partnership formed under the old act and which cannot bring itself under the new act or assume its *burdens,* may nevertheless have all the *benefits* of the new act. This construction is squarely opposed to the intention of the commissioners submitting and the legislatures enacting the Uniform Limited Partnership Act. If it stands it bids fair to work confusion. Instead of a carefully drafted substitute act, the Uniform Act will be but an amendment to prior acts, and the rights and liabilities of partners under prior acts must be determined by construing the former acts as if amended by the Uniform Acts.

It is clear that by section 30 the legislature intended to prevent the interweaving of the statutes and that each

statute should stand as a consistent whole; that limited partnerships formed under the prior act should, until they brought themselves under the Uniform Act, be governed *solely* by the prior act, and that after they brought themselves under the new act, they should be governed *solely* by that act. Of course, if a limited partnership had been formed, or attemped to be formed under the prior act for a purpose prohibited by the Uniform Act, it could never bring itself under the new act, but must continue to be governed solely by the provisions of the old act. And that act has no section 11.

It is also clear that the legislature did not intend, by section 11, to grant immunity to persons attempting, at any time, to form a limited partnership *for a purpose for which a limited partnership could not be formed* under the Act of 1917.

By expressly denying the right to organize as limited partners for brokerage purposes, the legislature impliedly required parties engaging in such a business to do so as general partners with unlimited liability.

Yet the controlling opinion of the Court of Appeals applies section 11 to a partnership *attempted* to be formed under the Act of 1874 to conduct a brokerage business, and gives to respondents, who for over two years from July 2, 1917, carried on a brokerage business in Chicago, finally ending in bankruptcy, all the immunities of limited partners, and more.

In the court below it was contended that the new act introduced into the law a new conception of limited partnerships, and that we now have a new creature of the law—limited partnerships—to which a new public policy is to apply. It probably was for that very reason that Illinois expressly excluded from such more liberal pol-

icy any partnership formed to conduct a brokerage business.

To apply section 11 to limited partnerships organized under the 1874 act, is to force into the new act a meaning the legislature expressly denied to it. It is extending the provisions of a lenient act to a business which could not be carried on under that act. It is evading the very purpose of the legislature in excluding brokerage houses from that act.

There is sound reason in the determination of Illinois refusing to allow a brokerage business to be carried on under the Uniform *Limited* Partnership Act. Every argument that the new limited partnership act created a new era in partnership but emphasizes the purpose and intention of the legislature that brokerage firms must not operate under that act, and the stronger such arguments are, the more certain it becomes that that act cannot be availed of to carry on a brokerage business.

Banking, insurance and brokerage have always been considered by the legislature of Illinois (and by legislatures generally) as differing from other business. There is good ground for such treatment. The trust the public necessarily places in banking, insurance and brokerage houses, the vast amounts of other peoples' money they handle, the duties they owe to protect and conserve that money, justify the law-making authority in refusing to allow such business to be carried on by a partnership with limited liability; and also justifies Illinois in refusing to allow banking or insurance business to be carried on by a corporation organized under the general incorporation act, in requiring double stockholders' liability in banking, and in refusing to allow a brokerage house to be incorporated at all.

Therefore, since July 1, 1917, no person is allowed in

Illinois to engage in brokerage business as a limited partner or as a stockholder. He must do so under the General Partnership Act, and place at the risk of that business his entire fortune.

Yet the Court of Appeals held:

1. That Section 11 of the Uniform Limited Partnership Act applies to partnerships formed under the prior act, and in fact, to partnerships that cannot be formed under the new act, and thereby respondents were relieved of all liability whatsoever.

2. That Section 7 of the Uniform *General* Partnership Act can be applied to firms attempted to be formed as *limited* partnerships but failing completely in that attempt, and then be so construed as to relieve the members from all liability, as either general or special partners.

3. That a brokerage house in Chicago formed as a partnership can do business for two or three years, invite deposits, squander funds, not make the investments for which funds were remitted, fail for a large amount, and still, under the two acts, be held to be no partnership at all, and that some at least of the partners go scot-free.

Under the Facts in This Case Respondents Could Have Had No Such "Erroneous Belief" That They Were Limited or Special Partners, as Is Contemplated in the Statute.

Nothing was done in this case in ignorance. All the partners interested in the venture knew just what was being done. They had all been traders on the stock exchange through the firm of Von Frantzius & Co. They were all experienced stock speculators. The whole venture was devised largely to recoup the losses that re-

spondents had made in the brokerage office of Von Frantzius & Co.

All the respondents knew of the attitude of the state toward brokerage concerns. They knew no corporation could have been for many years formed under the laws of Illinois to conduct such a business. They all knew the care and exactness with which the statute must be followed in perfecting a limited partnership.

They all knew that they had signed the partnership articles of April 2nd, in which they were each to contribute certain sums of money. They knew that a change had been made in the plan on account of a rule of the New York Stock Exchange. Each of them knew that on June 30th he contributed the exact amount that he was to contribute under the agreement signed on April 2nd. They knew on June 30th, when they either signed the articles of that date or the Hecht-Finn agreement, that they were doing wrong. They knew that the certificate presented and sworn to on June 30th, and filed on July 2nd stated that there were only two special partners when there were really seven. They knew that that false certificate stated that two special partners had contributed $190,000 to the venture, while that amount had been contributed by all seven of them.

They knew on June 30th that the certificate with those false statements in it could not be made the basis of a limited partnership. They knew that ever since 1874 the law relating to such a partnership had provided that "if any false statements shall be made in such certificate or affidavit, all the persons *interested in such partnership* shall be liable for all the engagements thereof *as general partners.*" They knew that they were "interested in such partnership" for they had contributed money to it and had power under certain circumstances to wind it

up; they had a right of inspection of its books; they had a right to receive the profits, and they were bound to share the losses.

Under such circumstances the law will not allow them to say they "erroneously believed" that a fair, valid, honest limited partnership had been formed.

Moreover, "erroneously believing" does not apply to disregard or ignorance of an important provision of the statutes. There have been numerous cases in Illinois where corporations have been held to be partnerships because the incorporators neglected to file a proper certificate with the county recorder. This very question of filing a proper certificate in the case of a limited partnership has been before the Illinois courts of record a number of times. (*Cummings* v. *Hays*, *supra*, and other cases cited, on pp. 81-82, *post.*) Such flagrant acts of violation of law are not covered by the term "erroneously believing" in Section 11 of the new act.

Moreover, this partnership ran for two years and eight months and nothing was done by any of the respondents to correct what was wrong. The new limited partnership act had been firmly established and much business done under it, and still no such attempt was made by respondents. Their relationship of general partners continued during all that time and it was not until a week or two after the firm was thrown into bankruptcy that diligent counsel brought up Section 11 as a possible loophole of escape. Under these circumstances, respondents cannot claim the benefit of this clause concerning erroneous belief.

Respondents Did Not Renounce All Interest in the Firm or Return All Profits, and Cannot, in Any Event, Claim the Benefit of Section 11.

Even assuming that Section 11 of the new limited partnership act could be applied to limited partnerships formed under the Act of 1874 and which have not filed a new statement or otherwise sought to bring themselves under the provisions of the 1917 act, respondents cannot claim the benefit of Section 11 because they did not tender or return to the firm or its receiver a sufficient sum of money in attempting to renounce.

The testimony concerning the return of $46,000 as the amount the respondents drew from the firm appears on pages 357 and 654 *et seq.* of the record. The partnership articles required all dividends from the business to be paid to the Chicago Title & Trust Company to be by it disbursed to respondents. On one occasion, however, a four per cent dividend was paid directly by the firm to respondents and by each of them retained as a dividend paid partners. Four per cent on $190,000 capital contributed by respondents would be $7,600. Money disbursed through the Chicago Title & Trust Company must have been $38,400, these two sums making the $46,000. Finn, a respondent, testified (Rec., 655) that he took into account "in computing this sum of $46,000 not only the amount which had been paid through the Chicago Title and Trust Company, but this 4 per cent that had been paid directly to the parties."

The total amount paid respondents by the firm for dividends and for interest on principal contributed was $43,700 as shown by page 351 of the record. Adding $2,300 for interest on those payments makes $46,000.

The articles of partnership (Rec., 22-3) provide that 6

per cent shall first be paid upon the capital contributed, and that out of the net profits there shall be next paid 25 per cent thereof to Marcuse, to be applied on the certificates of indebtedness issued by him to creditors of Von Frantzius, and it appears throughout the record and in the opinion of the Court of Appeals, that this payment of 25 per cent on those certificates was one of the main inducements to respondents to become interested in the firm. Page 357 of the record shows that semi-annual payments of interest were made on the capital contributed. Each of those interest payments to respondents aggregate $5,700. It appears that this interest was regularly paid and that in addition thereto there was a 4 per cent dividend amounting to $7,600 paid upon respondents's contributions in December, 1918. The payment shown on that page to have been made in December, 1919, consisted of $5,700 of interest and a dividend of $7,600, or $13,300 in all.

As at least two dividends were paid on respondents' contributions, there must have been also paid the 25 per cent of net profits upon respondents' Von Frantzius certificates. $15,200 were paid respondents *in dividends*, being 8 per cent thereon. There was therefore also paid 8 per cent dividends on the $140,000 contributed by Marcuse and Morris, $11,200, or a total of $26,400 in dividends. This latter amount, however, was only 75 per cent of the net profits, for 25 per cent of those net profits had first to be paid to the Von Frantzius creditors. The net profits, therefore, of the partnership were at least $35,200, of which one-quarter, or $8,800, was paid on Von Frantzius certificates and the other three-quarters, or $26,400, was paid as dividends. Respondents, therefore, must have received a large part of the $8,800 paid on the Von Frantzius certificates.

The distribution of the earnings must have been about as follows:

Interest on respondents' contributions	$28,500
Interest on contributions of Marcuse & Morris	21,000
Paid on the Von Frantzius certificates	8,800
Two dividends of 4 per cent each to respondents	15,200
Two dividends of 4 per cent each to Marcuse and Morris	11,200

The amount paid respondents consists of their $28,500 of interest and $15,200 of dividends, or $43,700. Interest on this amount would bring it up to about the $46,000 paid by Hecht and Finn.

Respondents were large creditors of Von Frantzius, probably the principal creditors. They must have received a large porton of the $8,800. What became of their shares of that $8,000? They did not return it to the firm or its receiver.

The partnership articles provide very specifically that the first profits all be paid upon the Von Frantzius certificates of indebtedness. This was not to pass through the Chicago Title and Trust Co. Respondents did not show the total amount of the Von Frantzius indebtedness. They probably received a large part of what was paid on it. They certainly received some of it. The burden was on them to show that they had returned to the firm *all* the profits they received, and to show this clearly. The $46,000 they did return was only the dividends and interest they received and did not include what they received through the distribution on the Von Frantzius certificates.

It is therefore clear that respondents did not tender or repay to the bankrupt firm or to its receiver all the benefits they had derived from the partnership which Section 11 calls for. This is a conclusive answer on the facts to everything said in argument or by the Court of Ap-

peals in favor of applying Section 11 to respondents. It is sufficient in itself to justify the District Court in finding as a fact that the respondents had not brought themselves under the proviso of Section 11, and such a finding and determination by the District Court is binding in this proceeding.

Finally, under no circumstances is Section 11 available to Vette, Zuncker, Regensteiner and the Studebakers. Hecht and Finn tendered to the receiver in bankruptcy $46,000, claiming that amount to be the aggregate of all received both by themselves and the other respondents from the firm. Hecht and Finn furnished the whole amount tendered. (Rec., 655.) The other respondents refused to allow or permit the tender to be made in their names. (Rec., 658-9.) They have to-day, each of them, in his pocket, every dollar he received from Marcuse & Co. by way of profits or otherwise. No one of them has "renounced" his interest in the partnership. They persistently declared they were not special partners and never had considered themselves as such under the second agreement. They maintain that position still in their pleadings, and therefore they could not *on their own theory* have "erroneously believed" that they were limited partners. They expressly declined to authorize Hecht and Finn to make a renunciation for them or in their name and have personally made no such renunciation. Without refunding profits received and without renouncing future interest in the profits, they claim the advantage of Section 11. This is a complete answer to all defenses founded on Section 11.

To Apply Section 11 to This Brokerage Concern Would be Highly Inequitable to Creditors.

If a partnership had been formed after July 1st for the purpose of banking and an attempt had been made so

to form it under this new limited partnership act, would anyone for an instant have thought that the firm so carrying on the banking business was a limited partnership and not a general partnership? In such a case would ignorance of the new law have supported a defense founded on "erroneous belief"? The very highest financial responsibility is required to protect people doing business with banking, brokerage and insurance institutions.

Yet controlling opinion holds that if, in spite of the prohibition of the statute, a limited partnership is formed to conduct a brokerage business, the partners may avoid liability under Section 11 of the limited partnership act. That opinion holds substantially that ignorance of material and important statutes, ignorance that the old statute has been repealed, ignorance that the uniform partnership acts have been adopted in Illinois, ignorance or disregard of the provisions and requirements of either the old or the new law, ignorance or disregard of many court decisions on general and limited partnerships, all may be excused under Section 11 and that such excuse may even cover the making of a false certificate as to who are the special partners and the several amounts they contributed. Violation of the law there results in immunity and manifest advantage to the violator. To accomplish this, the ruling opinion lifted Section 11 out of the Uniform Limited Partnership Act, applied it to an organization which could not have been formed under that act and allowed it to be used as a cloak under which respondents may escape liability, leaving the creditors to suffer.

Throughout the opinion the court seems to have been misled by the idea that it is not affirmatively shown that any person was prejudiced or injured by any concealment in this case, or that any person relied upon the lia-

bility of the concealed partners. Would this be a good answer to the small depositor of a savings bank which the promoters had attempted to organize under the limited partnership act? Certainly this reason does not apply to Hecht and Finn, for their certificate was on file, although informally, in the office of the county clerk. It was as much notice in that way as if the limited partnership had been properly formed.

Moreover, this point is not good on any principle of law. A claim that a person is not entitled to recover from *all* partners because he did not know the name of one partner or that that person was a partner, is no defense in the case of a general partner. There are many firms with only two persons appearing in the firm name that have eight or ten partners, and the public knows little about those not named, but they are all liable. The contention that only one who relied on the name of one of these partners can recover would do away with all the law ever written on the liability of an undisclosed principal, and would bring it about that a man whose name did not appear in the firm and who claimed that he was only a special partner could not be held liable. Such a doctrine would probably do away with the liability of one-half of the partners in our present commercial system. It would render unnecessary any law on limited partnership.

The conclusions arrived at by the Court of Appeals cut down the liability of partners and the remedies of creditors to an extent never before dreamed of. There is almost a license given for persons to associate themselves together in the banking or brokerage or insurance business in Illinois as a limited partnership, to make all they can out of it, and then having received the deposits and trust of many people, simply to say, when bankruptcy comes, that they "erroneously believed" they

were acting in compliance with the law and now that their attention has been called to their flagrant disregard of the statutes, they will return the profits they have made and go scot-free.

IV.

RESPONDENTS ARE GENERAL PARTNERS BOTH AT COMMON LAW AND UNDER THE UNIFORM GENERAL PARTNERSHIP ACT OF 1917. THE COURT ERRED IN HOLDING THAT NO PARTNERSHIP RELATION OF ANY KIND EXISTED. SECTIONS 6 AND 7 OF THE NEW GENERAL PARTNERSHIP ACT DO NOT SUPPORT THE COURT IN SO HOLDING.

The last part of the opinion of the Court of Appeals discusses what would result if Section 11 is not applicable and does not exonerate respondents. The majority opinion holds that even if Section 11 is not applicable the respondents are not liable as partners, and were not partners at all.

Section 6 (1) of the Uniform General Partnership Act.

Section 6 (1) of the Uniform General Partnership Act defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." This is but an adaptation of the common law definition of partnership as given in the best considered cases (*Meehan* v. *Valentine*, 145 U. S. 611; *State Bank* v. *Butler*, 149 Ill. 575).

The majority opinion held that respondents do not come within this definition of a partnership, and said, "The contractual relation of petitioners does not fall within this definition." And referring to the respondents other than Hecht and Finn, the court said that they *"do not by the finally executed contract purport to have entered into any partnership arrangement of any sort."*

What then was their relation? They were associated together. They were engaged in a business for profit. They were carrying it on as co-owners. They each contributed capital. They shared in the profits in proportion to the capital they contributed. They were to bear losses in the same proportion. They had power to dissolve the firm. On dissolution of the partnership the assets were to be distributed among them. What element is lacking to constitute a partnership within the definition of the Uniform Act?

In further reasoning to the conclusion that no relation of partnership existed in this case, the court refered to the first part of Section 7 of the Uniform *General* Partnership Act, which is:

> "In determining whether a partnership exists these rules shall apply:
>
> (1) Except as provided by Section 16, persons who are not partners as to each other are not partners as to third persons."

(Section 16 relates to partnership on account of representations, and has no application.)

The Court of Appeals then, in connection with the provision of the act just quoted, declared that *intention* to form a partnership was a fundamental requisite to a partnership, that if such intention was lacking the co-operating parties could not be held as partners as between themselves, and that, as the law just quoted provides that "persons who are not partners as to each other are not partners as to third persons," therefore persons could not be partners *as to third persons* unless they *intended* to be partners *to each other.*

Following this line of reasoning the court went further and divided partnerships into general and limited, and held that if parties intended to be limited partners, but were not so, through violating some statute, they could

not be held as general partners. Although they had intended to be partners of one kind, they could not be held to be partners of another kind. At one stroke this does away with all decisions holding as general partners those who wished or intended to be special partners.

Upon this fallacious reasoning the court held that as respondents intended to become limited partners but failed to become so under either the old or the new law, and as the *intention* to become one kind of a partner did not include becoming another kind of a partner, even as to third parties, and as they did not intend to become general partners, therefore, *they were not partners at all.* It would be hard to conceive a more illogical deduction.

In support of this reasoning the court, conscious that it was construing an Illinois law, cited five Illinois cases and one opinion of this court (*Goacher* v. *Bates,* 280 Ill. 372; *Smith* v. *Knight,* 71 Ill. 148; *Grinton* v. *Strong,* 148 Ill. 587; *National Surety Co.* v. *Townsend Brick Co.* 176 Ill. 156; *Insurance Co.* v. *Barringer,* 73 Ill. 230; and *London Assurance Co.* v. *Drennen,* 116 U. S. 461.)

In the *Goacher* case a live stock trader obtained money from a bank, his account being guaranteed by the cashier thereof, who was to receive for his guaranty part of the profits but not stand any losses. An accounting was asked on the basis of a partnership. The court held that there was no partnership.

In the *Smith* case money advanced to a partnership was to be repaid with interest and, as extra compensation for the loan, part of the profits of the business was to be paid, but the lender was not to be responsible for losses. The court held that no partnership was intended.

In the *Grinton* case Grinton was to take complete

charge of certain property, superintend expenditures on account of it, collect rents, etc. and was to receive 3% of amounts collected for rents and a certain amount of the profits if the property was sold. Brinton asked for an accounting, claiming he was a partner. The court held he was not a partner.

In the *National Surety* case, the surety company resisted liability on a surety bond on the ground that the contractor had taken a subcontracting firm practically into partnership with him and thereby avoided the bond. The court held there was no partnership and the surety company was defeated.

The *Barringer* case was also a loan of money to a partnership together with some guaranty of credit, but the lender of the money was never interested in any profits or losses. An insurance company defended on the ground that the lender of the money had become a partner whereby a new partnership had been formed which the insurance policy would not protect. Held no partnership and the insurance company was defeated.

In the *London Assurance Company* case the insurance company interposed a defense that by the admission of a new partner the firm had been changed so as to avoid the policy of insurance sued on. The insurance company was defeated, the syllabus of the case being:

> "An agreement by A with B that on the payment of a sum of money B shall participate in the profits of A's business, gives B no interest, *as between themselves,* in A's stock in trade, when it appears that it was their intention that he should have no such interest."

In all of these cases the courts, as was to be expected, dwelt particularly on whether there was an intention to form a partnership and in each of them found there was no such intention. The courts repeatedly said that *as*

between the parties there was no partnership. They also repeatedly laid down the doctrine that partnership did not depend upon the language used but upon what was done. The parties might declare themselves to be partners and yet not be partners; might declare themselves not to be partners and yet be partners, and that they might not be partners as between themselves and yet be partners as to third persons.

We submit that none of these cases are in point and that they do not support the ruling opinion.

The Court of Appeals also held that under the law as it was prior to the adoption of the Uniform Partnership Act, the existence of a general partnership "as between the parties themselves" was wholly a question of intention, and that therefore under Section 7 of the Uniform Act persons not intending to be partners as to each other cannot be partners as to third persons, and therefore the respondents were not partners at all.

This interpretation and application of Section 7 makes that section work a radical change in the law of partnership. It gives that section a very far-reaching effect.

Under that section as it is interpreted and applied by the Circuit Court of Appeals, several persons, as did respondents in this case, can associate themselves together, contribute capital to a banking or brokerage business, share profits and losses, enjoy all the advantages of a partnership, and then, when insolvency comes, if it can be made to appear that, although intending to enter into a relation with all the incidents of a partnership, they did not intened to be partners *inter se,* they are not liable as partners to third persons and thus escape all liability.

At common law it was the intention to enter into a relationship to which the law thereupon attached

partnership rights and liabilities, which was the criterion of a partnership.

The meaning of "intention" when used in ascertaining whether a partnership exists is a legal intention *shown by acts*, and as we are discussing the construction of an Illinois act, we cannot show what intention means better than is shown in the Illinois case next cited and by the authorities following it.

In *Fougner* v. *First National Bank*, 141 Ill. 124, it was said (p. 132):

> "While the intention of the parties is the criterion by which to determine whether or not a partnership has been formed, yet, as said by Justice Matthews in his work on Partnership (page 12, Sec. 31): 'It is very plain that parties cannot by agreement, enter into a partnership, and at the same time agree that what they have entered into shall not be a partnership.' Or, in the language of Breese, C. J., in *Lintner* v. *Millkin*, 47 Ill. 178: 'Parties may become partners without their knowing it, the relation resulting from the terms they have used in the contract or from the nature of the undertaking. They may make a bargain together without knowing it, which creates or involves a partnership, and subjects them to the law of partnership."

Meehan v. *Valentine*, 145 U. S. 611, is probably the leading case in this country on partnership. In that case Mr. Justice Gray undertook, after careful analysis of the cases, and sources of the law, to lay down some fundamental principles covering the law as to creation of partnerships. His conclusion was (p. 623):

> "In the present state of the law upon this subject it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit and who own and share the profits thereof in certain proportions. If they do this, the

incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; * * * that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; *and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons.*"

Textbooks state the same doctrine. In 20 Ruling Case Law, p. 833, it is said:

> "The intent, the existence of which is deemed essential, *is an intent to do those things which constitute a partnership.* Hence, if such an intent exists, the parties will be partners notwithstanding that they intended to avoid the liability attaching to partners or even expressly stipulated in their agreement that they were not to become partners. It is the substance, and not the name, of the arrangement or contract between them which determines their legal relation toward each other."

Likewise in 30 Cyc., page 360, it is said:

> "When a court is called upon to determine whether a particular contract constitutes a partnership between the parties thereto, its controlling purpose is to ascertain their intention *as that is disclosed by the entire transaction.* But the intention which controls in determining the existence of a partnership is *the legal intention deducible from the acts of the parties,* and, if they intend to do a thing which in law constitutes a partnership, they are partners, although their purpose was to avoid the creation of such relation. Particular clauses in the contract, or even express statements that it does or does not constitute a partnership, are not conclusive upon the subject."

The limited partnership act does not mean that persons who *say* they are not partners as to each other are not partners as to third persons. This must be so, otherwise parties intending to go into a joint venture could draw up partnership articles, provide for all the

incidents of a partnership and then rid themselves of partnership liability by merely adding to their contract.

> "The parties hereto shall not be partners as to each other."

If such a clause would relieve them from partnership liability there would be no need for limited partnership statutes. Partners may provide that some of them shall have large and some of them small interests in the partnership. As between themselves such provisions would govern. As against a third person, however, every partner would be liable for all the obligations of the partnership.

Under Illinois law a brokerage house that started business on July 2, 1917, could have been one of only three legal conceptions—a corporation, a limited partnership or a general partnership. There is no other possibility. These three divisions cover the entire field. Admittedly it was not a corporation. It is practically conceded that the parties failed in their attempt to create a limited partnership. Marcuse & Company must necessarily, therefore, have been a general partnership.

In holding that where parties intended to form a limited partnership but failed, they did not and could not become liable as general partners because they did not intend to be such, the construction of the statute by the Court of Appeals is in direct conflict with the decisions of the Illinois courts, which have repeatedly held that on failure to secure the statutory protection because of noncompliance with the limited partnership act, the partners *become liable as general partners.* In *Henkel* v. *Heyman*, 91 Ill. 96, the parties failed to properly file the statutory certificate and the court, holding them liable as general partners, said (p. 101):

> "The common law did not admit of partnerships with a restricted responsibility, and the statute,

therefore, authorizing limited partnerships must be substantially complied with, *or those who associate under it will be liable as general partners.*"

In *Manhattan Brass Co.* v. *Allin,* 35 Ill. App. 336, where the court found the certificate did not meet the statutory requirements, it was said (p. 341):

"It may be a hard case, and contrary to what the parties intended but did not express, to hold the appellees other than B. C. Allin as general partners; but the law is settled that 'the statute authorizing limited partnerships must be substantially complied with, *or those who associate under it will be liable as general partners.*"

In *Walker* v. *Wood,* 69 Ill. App. 542 (affirmed 170 Ill. 463), one of the purported limited partners had signed the requisite certificate by an agent and the court said (p. 549):

"The case presents important questions but we sum up our opinion by saying that the statute under which limited partnerships may be formed was not complied with, and *unless that is done the partnership is general.*"

There are many other authorties to the same effect. In 19 A. & E. Enc. of Law, 2nd Ed., p. 339, under the head of "Limited Partnerships," it is said:

"Generally a noncompliance with the statute will render the special partner *liable as a general partner.*"

And again (p. 343):

"The statutes authorizing the formation of limited partnerships all provide in what business such partnerships may engage. *A limited partnership cannot be formed for the transaction of any business not authorized by statute,* and an attempt to do so renders the firm an ordinary partnership *in which all the members are generally liable.*"

And again (p. 353):

"A false statement in the affidavit renders all members *liable as general partners,* and it is imma-

> terial whether or not the special partner knew of the false statement or whether it was made intentionally or unintentionally, *or whether creditors were injured by it or not.*"

Many cases are cited in support of the above text.

The new Illinois uniform limited partnership act provides, as the principal preliminary, that the parties shall sign and swear to a certificate. It then requires that certificate to be recorded. Then there is a requirement that the certificate can only be amended by a statement signed and sworn to by all the parties, and there are other like requirements. Should parties now associate themselves under the new act and not sign such a certificate or swear to it or record it, but proceed to carry on business as a partnership, has the law been so greatly changed that they would not all be chargeable as general partners?

The interpretation put upon Section 7 by the Court of Appeals changes this long-established law and makes the intention to form a partnership *inter se* the *final* test of partnership *as to third parties,* and holds that if that intention was not present, there is no partnership under any circumstances.

That the Court of Appeals realized that its interpretation of Sections 6 and 7 worked a substantial change in the law of partnership is evidenced by its statement that with the wisdom of such a change of policy it is not concerned, and that if, under the construction given the statute the new test of partnership proved impracticable in experience, the remedy is with the legislature alone. A law so important, prepared with so much care and passed by so many states, ought not to be given so strained and unusual a meaning and then tossed lightly back for amendment.

The commissioners on uniform state laws, and the

legislatures of Illinois and other states, in enacting the uniform general partnership law, could not have intended any such far-reaching effect by Sections 6 and 7. Section 6 defines a partnership. Under the court's interpretation of Section 7, although all the elements of a partnership as defined in Section 6 are present, if the parties did not intend between themselves to become partners, a partnership did not exist.

The further subdivisions of Section 7 explain its purpose. It is provided that a mere joint tenancy or common ownership of property or the sharing in gross profits or returns received, as interest on a loan, wages of an employee, annuity to a widow of a deceased partner, consideration for the sale of good will of the business, etc., do not constitute a partnership. This but declares a common law principle, except that a few courts have held that sharing in profits was a conclusive test of partnership and made the parties liable even though the profits were received as compensation by an employee, for a loan of money, etc. Section 7 was intended to clarify and codify the law of partnership in this regard, and not to work an overwhelming change in all our ideas of partnership.

As above interpreted and applied by the Court of Appeals, Section 7 is not a codification of the present law on partnership but works a most radical change in that law.

Respondents However, Did Intend to Form a Partnership between Themselves. The Evidence Shows Such an Intention and Supports the Finding of the District Court.

To apply its interpretation of Section 7 and its conception of the law of intention to this case, the Court of

Appeals found as a fact that the respondents did not intend to become partners as between themselves. As there was evidence to the contrary and as the District Court evidently found to the contrary, we do not see how the Court of Appeals could consider that question of fact.

To show and that the parties *did intend* to enter into a partnership, we submit the following extracts from the final partnership. The first recital is:

> "Whereas the said parties *desire to become partners* with one another under the name of Marcuse & Co." (Rec., 20.)
>
> "(1) The said parties above named have agreed *to become copartners in business* and by these presents do agree *to be copartners* to one another under the firm name and style of Marcuse & Co. in the brokerage business of buying and selling for others on commission, stocks, bonds, grains, provisions and various commodities." (Rec., 20.)
>
> "(6) It is further hereby agreed that all of the capital to be contributed as aforesaid, shall be used and employed by *the said partnership* for the purpose of carrying on the business agreed to be conducted under the terms hereof, and for no other purpose." (Rec., 21.)
>
> "All of the balance of the said net profits of said business shall be divided among all of the parties hereto except the said Morris in the proportions in which they have contributed to the capital or capital stock of said firm." (Rec., 23.)
>
> "All losses of every kind sustained in said business shall be paid by the *said copartners* in the same ratio and proportion as said profits are divided." (Rec., 23.)

The partnership agreement signed June 30th was signed by Marcuse, Morris, Hecht and Finn. (Rec., 25.) The so-called Hecht and Finn trust was signed by Hecht and Finn (Rec., 31), and on the succeeding page a certificate is attached thereto signed by Marcuse, Morris,

Hecht and Finn "individually *and as copartners* under the firm name of Marcuse & Co."

There is hardly a paragraph in the agreement which does not refer to the parties as partners and the agreement as a partnership agreement.

The parties therefore understood and *intended* to enter into a partnership relation. They may have hoped or intended to become limited partners, but they did intend to become partners as to each other.

V.

Clement and George M. Studebaker Were Properly Held to Be Partners.

The Studebakers insisted in their pleadings and arguments that they were not partners in Marcuse & Company, but that the $50,000 put into that firm and contributed by them was in reality a contribution to the firm by the Studebaker Brothers Trust. That contention is wholly unsupported by the testimony, and the District Court having heard conflicting testimony on that point placed the two Studebakers in the same category with Hecht, Finn, Zuncker and the rest of the respondents. In so doing the District Court must have been satisfied from the evidence that the Studebakers were partners and that the contribution had been made by them. There was abundant evidence to support this implied finding of the District Court.

Marcuse testified that in March, 1917, he had a conference with Clement Studebaker in Boston and told him of the plan outlined for forming a new partnership to take over the Von Frantzius business and to pay the Von Frantzius creditors. Marcuse asked Studebaker to contribute $50,000 or $100,000 to the new firm. Clement

Studebaker told Marcuse that he and his brother George would act together in the matter and would contribute capital to the proposed firm. The amount of the contribution was left open (between $50,000 and $100,000) but Clement told Marcuse that he would immediately communicate with Scott Brown of Chicago who would attend to the details. (Rec., 442-446.)

On Marcuse's return to Chicago, Brown told him he had received a letter from Clement Studebaker instructing him to give Marcuse assistance and to help him get the new firm started, but that he wanted to keep the contribution low and had decided that its amount should be $50,000. (Rec., 447.)

Marcuse testified he received $50,000 from Brown for the firm and said: (Rec., 448):

> "Q. What did Brown tell you as to where this money came from, if anything,—this $50,000?
> A. From the Studebaker Brothers.
> Q. Did he mention the names?
> A. Yes.
> Q. What names did he mention?
> A. Clement and George M."

In signing the original partnership articles and agreeing to contribute $50,000 Hoffman was admittedly acting for the Studebakers.

Marcuse further testified that after the original plans had been upset by the discovery of the New York Stock Exchange rule, he told Brown about the new plan and Brown told him that Hecht had made a very favorable impression upon him and he was satisfied to have Hecht represent their interests. (Rec., 467.)

Afterwards claims of all the respondents against the Von Frantzius estate, including the Studebaker claims, were assigned to Marcuse.

Neither of the Studebakers testified on the hearing.

The only other testimony showing the Studebakers connection with the partnership was of their counsel, Buckingham.

Buckingham testified that he was absent from Chicago when the first partnership articles were signed, and returned in May; that after his return, Stein and Marcuse came to his office to meet him and Brown by appointment; that Stein told Buckingham of the difficulty in organizing Marcuse & Company, and that it was necessary to get up another arrangement as he could only have two special partners; that he would like to have some one representing the Studebakers' interest as a special partner, and asked that their contribution be increased to $100,000. (Rec., 551-53.)

Buckingham testified that he told Stein and Marcuse that he would not consent to anyone in their group appearing as a special partner; that he would not consider contributing more than $50,000; that that would be contributed from the Studebaker Brothers' Trust, and that he would want a trustee's certificate that could be put into the trust fund. (Rec., 552-53.) He further testified that Stein submitted to him two drafts of the revised agreement, neither of which was quite satisfactory to him, and that he, Hoffman and Robertson (the latter representing Vette and Zunker) prepared the final draft of the documents which were executed. (Rec., 564.)

The Studebaker contribution to the fund was made with the check of the Studebaker Brothers Trust to the order of Hoffman, endorsed by Hoffman to Hecht and Finn, and by the latter to Marcuse & Company.

The certificate of interest in the enterprise given to Hoffman was made out in his name and by him endorsed and sent to the Chicago Title & Trust Co. and it was after that carried as part of the Studebaker Trust.

The Studebaker Brothers Trust was brought into court and introduced in evidence. (Rec., 576.) It was an agreement with only three parties interested, Clement and George Studebaker and Scott Brown. The two former contributed the funds to create a trust of which the Chicago Title & Trust Company was trustee. It was to be administered by three directors, Clement and George Studebaker and Scott Brown. The other two directors had the right to remove Brown. The entire income of the trust fund was to be paid to the two Studebakers, or as they directed, except a salary and percentage of the profits to Brown, as compensation for his services..

On dissolution, the *corpus* was to be distributed amongst the grantors *pro-rata* in proportion to the value of the securities they had contributed to the fund.

On this testimony, the District Court found that Clement and George Studebaker had contributed $50,000 to and were partners in the firm of Marcuse & Company.

The fact that their contribution was made by a check of Studebaker Brothers Trust is entirely immaterial. The contribution of Regensteiner, for instance, was paid by a check of the Regensteiner Colortype Company. From the inception of the scheme it was the desire of Clement and George Studebaker to contribute $50,000 towards the new firm that they might collect their losses from the Von Frantzius failure.

It makes but little difference how they made the contribution to Marcuse & Company; whether they did it in the name of Hoffman or in their own name, or in the name of the Studebaker Brothers Trust. It makes but little difference how the profits going to the Studebakers were distributed, whether to Hoffman, the Chicago Title & Trust Company, Studebaker Brothers Trust or to

George and Clement Studebaker individually. The so-called Studebaker Brothers Trust was but a joint venture or partnership in which the Studebakers were partners. There was no element of trust about it; the Chicago Title & Trust Co. was depositary and held the funds to be invested; the two Studebakers, the beneficiaries, had complete control thereover. Their liability under any circumstances would be the same. In Illinois at least joint ventures of this character are nothing but partnerships (*People* v. *Brander,* 244 Ill. 26, and cases there cited; *Morse* v. *Richmond,* 97 Ill. 303.)

Neither of the Studebakers took the stand to dispute in any way the testimony of Marcuse, of Hoffman, or of Brown. The faltering explanations given by Buckingham cannot avail, and the testimony to the effect that George and Clement Studebaker were partners, equally with Finn, Vette and the other respondents, stands practically uncontradicted. Certainly there was evidence to justify the District Court in entering the order complained of.

Liability of Hecht and Finn Is Not Contingent on the Liability of the Other Respondents.

The primary liability of Hecht and Finn in the first instance is not affected by the more lengthy discussion as to the liability of the other respondents. Hecht and Finn did sign the partnership articles. The certificate which the statute expressly made a condition precedent to the formation of a special partnership, was not filed until after repeal of the only statute under which a limited partnership to conduct a brokerage business could be formed. The abortive limited partnership must, therefore, have become a general partnership and Hecht and Finn are liable in the first instance as general partners.

This primary liability of Hecht and Finn which seems to be conclusive, can be stated in a few words, and, therefore, occupies a relatively small part of this brief. We further insist that Hecht and Finn were liable for the *additional* reason that the statutory certificate was false. We also insist that Hecht and Finn were but the representatives of themselves and the other respondents and that they are all in the same situation. The relation of the other respondents to the partnership involved the consideration of more documents and more testimony and, therefore, occupies the larger portion of this brief. Even if the court should not agree with our position as to the relation of the other respondents to Marcuse & Co., this does not affect in any way the primary liability of Hecht and Finn arising from failure to complete the special partnership prior to the repeal of the statute.

Conclusion.

On July 2, 1917, the firm of Marcuse & Co. started business. It was formed for the purpose of and carried on solely a brokerage business. In March, 1920, it wound up in bankruptcy. The capital was furnished and the profits and losses were to be divided amongst the respondents. As originally planned, each of the respondents in his own name was to appear as an alleged special partner. To circumvent a rule of the New York Stock Exchange the *form* of the transaction was changed so that the respondents other than Hecht and Finn would make their contributions through the two latter and on the face of the papers there would appear to be but two special partners. The respondents, however, reserved to themselves the right to examine the partner-

ship books, receive monthly reports and annual inventory and audits, to appoint auditors to examine the books and to dissolve the business—every right of a special partner.

They received, up until the eve of bankruptcy, alleged profits. Starting business on July 2, 1917, within four months the firm's capital was gone. Beginning, however, with December of 1917 and continuing until December, 1919, semi-annual interest and alleged dividends were paid respondents. These dividends were not only not paid out of profits, but they were not even paid out of the firm's capital. They were paid out of the customers' money. In December, 1919, on the eve of bankruptcy and when the firm must have been hopelessly insolvent, over $13,000 of customers' money was distributed as alleged dividends. If respondents did not know the condition of the business and the source of these alleged dividends, they should have known it. They had carefully reserved to themselves the right of examining and auditing the books and of receiving monthly and annual reports. *If* they did not know the condition of the business, it was their own fault.

Admittedly the attempt to form this concern as a special partnership failed, but for nearly three years it went on doing business. It was not a corporation. It was not a limited partnership. What else could it have been but a general partnership?

Had this firm been successful, had large profits been realized, respondents would, in proportion to their contributions, have profited thereby. For the manner in which the business was conducted and for its present condition, they, not the public, and not the creditors, are responsible. Theirs should be the loss. There is no inequity in holding those who owned the business

and who would have realized the profits, had the business been successful, liable for its debts.

We respectfully submit that the order of the District Court should be affirmed.

William Burry,
Julius Moses,
Guy M. Peters,
Lewis F. Jacobson,
Attorneys for Petitioners.

Chicago, July, 1923.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 59

IN THE MATTER OF MARCUSE & COMPANY,
ALLEGED BANKRUPTS.

C. B. GILES ET AL.,
Petitioners,
vs.
HENRY VETTE ET AL.,
Respondents.

BRIEF AND ARGUMENT FOR EXECUTORS OF FRANK A. HECHT AND JOSEPH M. FINN, RESPONDENTS.

HORACE KENT TENNEY,
CHARLES F. HARDING,
ROGER SHERMAN,
Attorneys for Executors of Frank A. Hecht.
CARL MEYER,
HENRY RUSSELL PLATT,
Attorneys for Joseph M. Finn.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

Table of Cases.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 59.

IN THE MATTER OF MARCUSE & COMPANY,
ALLEGED BANKRUPTS.

C. B. GILES ET AL.,
Petitioners,

vs.

HENRY VETTE ET AL.,
Respondents.

CERTIORARI TO UNITED STATES CIRCUIT COURT OF APPEALS,
SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR EXECUTORS OF FRANK A. HECHT, DECEASED, AND FOR JOSEPH M. FINN, RESPONDENTS.

The interests of Frank Hecht (deceased) and Joseph M. Finn and their attitude toward the questions of law involved in this proceeding at various points differ radically from the interests and claims of the other respondents in this case.

While we confidently contend that the decision of the Court of Appeals should be upheld and that only Ben

Marcuse and L. H. Morris should be held to be general partners in the firm of Marcuse & Company, yet we contend with equal confidence that if, contrary to our belief, this court should hold that those who signed the limited partnership agreement of June 30, 1917, must be held as general partners of the firm of Marcuse & Company, then the respondents, Vette, Zuncker, Regensteiner, George M. Studebaker and Clement Studebaker, must be held to the same responsibility. It is evident, therefore, that, while we are directly opposed to the petitioners in their claim that all the respondents should be held liable as general partners, we are equally opposed to the claim of the other respondents that, if Hecht and Finn shall be held as general partners, yet the other respondents escape, even though, as signers of the so-called Hecht-Finn Trust Agreement, they participated equally with Hecht and Finn in both the benefits and the powers which the latter might receive and exercise under the limited partnership agreement.

It is, therefore, not only proper but necessary that a separate brief should be filed on behalf of Hecht and Finn. And while we will endeavor to avoid repetition of the arguments of the other respondents upon points where their interests are identical with our own, or like repetition of the argument of the petitioners upon matters where their contention is akin to our own, yet we believe that our duty to our clients and to the court compels us to present the reasons for our position.

We agree in the contention of petitioner's counsel that a decision holding that Hecht and Finn are liable would logically involve a similar liability on the part of the other respondents. We do not, however, fully coincide with all the statements of petitioner's counsel in their argument upon this and the related questions.

On the other hand, we cordially agree with the brief and argument of counsel for the other respondents as to the purpose, scope and effect of the provisions of the Partnership Acts passed by the Legislature of Illinois, which became effective on July 1, 1917, although we likewise are unwilling to be charged with some suggestions made in the course of that argument seeking to differentiate between the position of Hecht and Finn and of the other respondents, whereby it is suggested that the responsibility of the other respondents is less than that of Hecht and Finn.

With this explanation of the reasons which have compelled us to file a separate brief instead of joining the other respondents in their brief and argument, we beg to suggest that our own contentions on behalf of our clients are as follows:

First. We contend that neither Hecht nor Finn ever were general partners in the firm of Marcuse & Company or responsible as such.

Second. We contend that if the statute of 1917, becoming effective July 1, 1917, removed from Hecht and Finn the protection of the limited liability provided by the Act of 1874, nevertheless, under the terms of the Act of 1917, the renunciation by Hecht and Finn of their interest in the profits of the business or other compensation by way of income, and their refund of $46,000, which was more than the amount of all the profits or other compensation by way of income received by all the persons who took part in the formation of the firm of Marcuse & Company other than Marcuse and Morris, fully exonerated Hecht and Finn from any further responsibility beyond the obligation of a special partnership.

Third. While we contend that the action of Hecht and Finn, although not expressly sanctioned by the other respondents, operated to exonerate all such respondents from liability as general partners, yet we point out that Hecht and Finn personally contributed each $23,000 and personally signed the instrument of renunciation; and that, as to Hecht and Finn, there can be no question that the renunciation was direct and explicit and the tender more than ample.

Fourth. We contend that the actual relationship of the parties evidenced by the execution of the Hecht-Finn trust contemporaneously with and as a part of the partnership arrangement constituted such a relation between the contributors to the partnership funds attempted to be established under the limited partnership law as it existed prior to July 1, 1917, that the other contributors to such fund who executed the Hecht-Finn trust agreement were equally responsible, if responsible at all, for the debts of Marcuse and Company.

Fifth. We contend that, if Hecht and Finn are to be held liable as general partners, the correct decision of the responsibility of the other contributors to the capital of the limited partnership is of supreme importance to Hecht and Finn, for the reason that, to hold all the contributors to the limited partnership fund liable would be to inflict upon each one a heavy but sustainable loss; while, to impose the exclusive burden of that loss upon Hecht and Finn, would spell ruin for them both.

STATEMENT.

The case was decided in both the lower courts upon the legal effect of the documents executed by the parties in connection with the formation of the partnership of Marcuse & Company, and which evidenced the contributions made by the different respondents to the capital of the firm and the rights which they had *inter sese* with reference thereto. As it is suggested in the brief of petitioner's counsel that a presumption is to be indulged that the District Court found some other facts which might sustain its decision, we call attention to the following features of the case supplementing and in some respects correcting petitioners' statement of it:

Pleadings.

The proceeding was a petition in bankruptcy to have the respondents adjudicated bankrupts. In the inception of the case the proceeding was against Marcuse, Morris, Finn and Hecht; the other respondents being made parties afterwards, when the creditors had learned of the facts now *relied* upon to hold all of the respondents liable. (Pr. Rec., 33.)

No petition alleged as a reason for holding respondents liable that there was any fraudulent concealment; or that any statement in the articles was either fraudulent or false. The case was based upon the documents themselves, coupled with the allegation that the statute of 1874 was repealed by the statute of 1917; that the later statute did not allow the formation of a limited partnership to engage in brokerage business and that the partnership articles were filed in the office of the county clerk

on July 2nd. (Pr. Rec., 42-47.) As a matter of pleading there was presented, as the basis of the creditor's rights, no issue involving anything but the legal question of the effect of the instruments as executed. A finding of fraud or false statement would not have been responsive to any issue made by the petitioner's pleadings.

The District Court made no finding of facts which, either directly or by inference, included a charge of fraud or of false statement in the partnership articles, its decision in reality is but a statement of its legal conclusion from the documents.

The conclusion announced by the court was:

> "That the so-called special partners are all general partners; that these so-called 'special' partners selected—all of them selected, Hecht and Finn as the agents for the operation of the special partnership by and through Hecht and Finn; that Hecht and Finn in fact were Hecht, Finn, Vette, Regensteiner, the Hecht-Finn trust, the Studebaker trust, as Clement and George Studebaker—that is what Hecht-Finn were; they were all of these people; and that thing was not a special partnership but it was by the law a general member of a general partnership, by reason of the failure to comply with the Illinois statute specifying the steps and prescribing the route to be taken to constitute a limited partnership, which as I have announced before, it was my view had to be obeyed to accomplish that end, but which in this case was not done in any essential particular." (Pr. Rec., 689.)

The order of the District Court made no further statement in the nature of finding of facts, but merely directed the referee to make findings of fact and conclusions of law as to the solvency up to March 11, 1920, of all of the respondents (naming them) "composing the firm of Marcuse and Company." (Pr. Rec., 222.)

The statement in petitioners' brief that the adoption of the Hecht-Finn trust and the execution of limited partnership papers by Hecht and Finn alone as limited partners, was for the purpose of "circumventing," or deceiving, the New York Stock Exchange is merely the use of an epithet to describe a fact. The fact is that the parties were advised that the papers which they finally executed complied with the requirements of the Stock Exchange, and were proper to be executed to form a limited partnership, without liability on the part of any one except the general partners.

The revised partnership agreement and the Hecht-Finn trust.

Counsel say that these documents were a part of one transaction. (Brief, p. 15.) But when construing them together—as such documents are construed—counsel make a statement of their provisions which may be somewhat misleading. For they speak of the partnership articles as containing certain provisions—thus presenting it as a separate agreement. They then turn to the Hecht-Finn trust and, treating it as a separate document, assert that it *restores* certain rights which the other document *took away*. Specifically, they say that Hecht and Finn, under the partnership article, were to draw the dividends payable to all "the special partners"; and that the other respondents had no power to appoint an auditor, or call for a dissolution. (Brief, p. 14.) Then, taking up the Hecht-Finn agreement—which they say was a part of the very document they had been discussing—they say that it *restores* to the respondents other than Hecht and Finn the very things which the other document, on their contention, had taken from them. (Brief, p. 15.)

But the substance of the transaction and the very theory of petitioners that these documents should be construed together, show that they did not give to Hecht and Finn the right to draw these dividends, audit the books, or exercise other independent powers, but expressly provided that the dividends should not be paid to them, but to the Chicago Title & Trust Company, as a sort of receiving agency for all who had contributed the capital: It is plain that Hecht and Finn had no greater power in the association than was possessed by any of the other respondents; and that this result was provided for by the concurrent action of all the respondents in the documents which they executed.

The case does not involve the equity of a creditor who has relied upon a deceptive appearance of partnership.

All of the letterheads and other papers of the firm show that Hecht and Finn were only limited partners. (Pr. Rec., 348-527-528.)

No creditor dealt with the firm upon the assumption that they would be liable for his debt.

The relations of the other respondents, through the Hecht-Finn trust, was entirely unknown. No creditor knew of their relation or gave credit to the firm because of their connection with it.

Everyone who dealt with the firm did so upon the assumption that no one was liable for his debt except Marcuse and Morris.

The amount refunded by Hecht and Finn was sufficient to cover everything received by them.

It is suggested that the $46,000 refunded by Hecht and Finn may not have been sufficient to cover all that had

been paid by way of profits to special partners, because payments may have been made by Marcuse upon the old claims which the respondents had against the firm of Von Frantzius.

There is no foundation for this claim; it was not made in the District Court; no evidence was offered showing that such payments had been made.

It was undisputed that the $46,000 was ample to cover everything which ought to be refunded to comply with the statute.

No objection, or argument based upon this ground was made in the Circuit Court of Appeals. That court expressly stated that:

> "The uncontradicted evidence is that the amount thus paid was sufficient to cover these items." (*i. e.*, as stated by the court the interest and profit paid by the firm to the investors of the entire $190,000 since the organization of the firm, including interest thereon from time of payment.) (Pr. Rec., 738.)

The court also said:

> "The record shows the compliance was to the fullest extent that might be claimed on behalf of creditors; *and it is not contended that the unconditional payment of the* $46,000 *falls short of compliance with the section if the section had application.*" (Pr. Rec., 743.)

The foregoing quotation from the opinion of the Circuit Court of Appeals is fully justified by an examination of the record and by an inspection of the briefs filed by the petitioners in the Circuit Court of Appeals.

The claim now made in petitioners' printed argument, that the contributors to the capital of the limited partnership received payment of a share of the profits of Ben Marcuse through the application of such share of the profits to the payment of the debts of Von Frantzius & Co., was never made in the District Court and never sug-

gested in the Circuit Court of Appeals. If there were any foundation in fact for the statement that such profits were distributed to the creditors of Von Frantzius & Co., including the respondents, it would be a sufficient answer to say that any sums so paid would have been received by the respondents not as partners in Marcuse & Co., but as creditors of Von Frantzius and it could not have been a proper condition of renunciation by the limited partners that they should also return payments made to them in a different capacity.

But an even more categorical answer can be made by the statement that it is not a fact that any of the respondents ever received any share of the Marcuse profits by application thereof to the payment of any part of the Von Frantzius indebtedness. Not only is there no evidence in the record to support petitioners' statement, but the contrary is plainly deducible from the record.

The conditions under which Ben Marcuse was to apply any part of such profits to the payment of the Von Frantzius debts are clearly outlined in the testimony of Marcuse himself (Pr. Rec., 443, 444), where he says:

> "I told him (Studebaker) that if I could form this firm, I had agreed to get the Von Frantzius estate out of bankruptcy and that I had obligated myself to pay any deficit that might arise out of the estate from my personal profits in a firm which I intended to form."

We call attention to the fact that it was only the DEFICIT which was to be so paid. There is no evidence as to the amounts which the firms of Von Frantzius & Co. owed to the contributors to the limited partnership and the statement in the argument of petitioners that they were probably the holders of the larger amount of the indebtedness is neither based on fact nor borne out from any proper intendment of the evidence. It appears that the

claims of the known creditors of Von Frantzius amounted to $1,215,370.18 (Pr. Rec., 478), and there is no justification for the charge that more than a comparatively small fraction of this amount was owed to the respondents.

The record shows an exhaustive questioning of the witnesses before Judge Landis on all the points then in dispute but no suggestion is found in any of those questions that any part of the Marcuse profits had been paid to the Von Frantzius certificate holders. Had such been the fact, it is incredible that the extremely vigilant attorneys for the petitioners would not have made the fact clear but an examination of exhibits offered by the petitioners shows clearly the terms and the time when any share of the profits of Ben Marcuse from the new partnership was to be applied to the liquidation of the claims of the creditors of the old concern.

The whole plan of the liquidation of the Von Frantzius assets appears from the Probate Court records and the trust certificate offered in evidence. (Pr. Rec., 474, 488, incl.) The plan was as follows:

Marcuse procured the great majority of the Von Frantzius creditors to agree that the assets of the Von Frantzius estate might be turned over to Marcuse as trustee on his executing certain bonds and making certain payments for the protection of the administrators of the Von Frantzius estate. Marcuse satisfied the bulk of the claims so far as the administrators of the Von Frantzius estate were concerned by obtaining assignments of the claims of the individual creditors, and in return for such assignments Marcuse gave to each of the creditors the trust certificate found on pages 474 to 477 of the printed record. In this certificate he agreed:

1. To acquire the Von Frantzius assets.
2. That he would pay the Von Frantzius creditors who did not accept the trust certificates.

3. That he should organize a new partnership.
4. That he would turn over the Von Frantzius assets to the firm for liquidation in the usual course of business for the account of the certificate holders.
5. That after the assets had been liquidated, he would cause the firm to account to the certificate holder, and, if a deficiency then arose, that Marcuse would pay such deficiency out of profits accruing to him as a member of the new firm.

It is not claimed and could not be truthfully claimed that the assets of the Von Frantzius estate turned over to the new firm had been liquidated. While that matter is not set forth in the record, because it was not a subject of controversy during the trial in the District Court when all of the Marcuse & Company books and papers were accessible, yet we assert that the petitioners cannot deny that the account of Marcuse as trustee of the Von Frantzius assets remained one of the largest accounts upon the books of the new partnership, that a very large proportion of the assets taken over by Marcuse from the Von Frantzius estate remained unliquidated, and that therefore no occasion had arisen under the fifth paragraph of the Marcuse trust receipt for Marcuse to turn over any portion of the profits realized by him from the new firm. The exact language of the Marcuse trust receipt found in Section 5 on page 476 of the printed record is as follows:

> "That immediately upon the liquidation of the said assets, I will cause said firm to make proper account thereof to said holder and, if upon the settlement of this said account with Von Frantzius & Co. any deficiency shall arise, I hereby agree to and do hereby obligate myself to pay such deficiency with lawful interest thereon in full out of any and all profits that shall accrue to me as a member of the said partnership so organized by me. That said profits so accruing to me as a member of said partnership shall be by me annually distributed among the holders of this and similar certificates

pro rata according to the deficiencies of each of such holders, and, in the event of a winding up or liquidation of said partnership, my share of the assets thereof shall likewise be distributed pro rata to the holders of this and similar certificates according to their respective deficiencies and to the extent that it may be necessary to pay such deficiency."

It is, therefore, plain that the distribution of Marcuse's share in the profits of the new partnership was not to be made until the trustee account had been liquidated, and the deficiency ascertained. As there had been no liquidation, there had been no deficiency established and therefore no profits had been so distributed, and the reason why the claim now made by the petitioners was not presented in the District Court becomes plainly established.

But in any view, the payment made by Hecht & Finn was far more than sufficient to cover all that they had received. The payment was from their own funds, no contribution being made by the other respondents. The statute of 1917 did not require Hecht and Finn, in order to secure for themselves the benefit of Section 11, to refund that which had been paid direct to the other respondents, without even passing through their hands. Whether—if there had been a shortage through any miscalculation of amounts—the payment would have been sufficient to extend the protection of the statute to the other respondents is another question, and one which is not involved in the protection of Hecht and Finn.

THE FACTS AND DOCUMENTS RELATING TO THE SITUATION AND LIABILITY OF THE RESPONDENTS OTHER THAN HECHT AND FINN, IF THOSE TWO ARE HELD TO BE GENERAL PARTNERS.

If it should be held that an omission of full and strict compliance with statutory provisions placed Hecht and Finn in a position where, as to creditors they are to be treated as general partners in the firm of Marcuse & Co., then it is important to consider whether the penalizing consequences of that decision can properly be limited to them, or whether it should include also the other respondents who were associated with them in the common enterprise out of which the liability arises. Upon that question the facts as to the provisions of the documents evidencing their relations are important. These are the documents relied upon by the petitioners to establish their initial and basic proposition that the firm was a general partnership.

The reasons for forming the partnership of Marcuse & Co. The contemporaneous agreement between Marcuse and respondents Vette and Zuncker.

Counsel for petitioners assert, and rely upon the fact, that the reason for the organization of the firm was not merely the expectation of profitable investment, but was also a means of saving something out of the wreck of a former enterprise in which all of the respondents—except Zuncker and Vette—were interested. We therefore summarize these facts, the provisions of the private agreement between Marcuse and respondents Vette and Zuncker, and of the Hecht-Finn trust, as follows:

The Studebaker brothers, Regensteiner, Hecht and Finn were creditors of the insolvent firm of Von Frantzius & Company. It was, therefore, planned by

Marcuse that the assets of Van Frantzius should be acquired by Marcuse, and that through this new arrangement the old claims against Von Frantzius might be collected. Marcuse, in testifying to this plan (Pr. Rec., 443) said that he told Studebaker that he would organize a new firm and desired him to become a special partner; that, if this could be done, Marcuse had agreed to get the Von Frantzius estate out of bankruptcy and had obligated himself to pay from his personal profits in the firm any deficit that might arise out of the Von Frantzius estate. (Pr. Rec., 476.) Scott Brown, the agent of the Studebakers, afterwards told Marcuse that Clement Studebaker had written him, instructing him to give Marcuse the assistance he required and help him to get the new firm started. (Pr. Rec., 447.) Brown told him that this money was to come from Clement and George M. Studebaker. (Pr. Rec., 448.) In pursuance of this plan, Marcuse made arrangements for the purchase of the assets in the Probate Court, and each of these parties assigned their claims against Von Frantzius to Marcuse. (Pr. Rec., 474.)

Mr. Hoffman also testified to these facts, saying that the Studebakers, because of their position as creditors of Von Frantzius, were interested in Marcuse's suggestion of forming the partnership, and that "the result of these negotiations was the Hecht-Finn trust"; that "the interest of the Studebaker brothers was the protection of their claim against the Von Frantzius estate, possibly they could make it in full." (Pr. Rec., 674.) In this same connection, he spoke of the Studebaker brothers as being "the gentlemen whom I represent"; and, referring to the purpose of the original agreement for a limited partnership, in which he was to appear as special partner, said: "It was our desire to become lim-

ited partners if that served the purpose of recovering our claim against the Von Frantzius estate." (Pr. Rec., 683.) The two Studebakers and Regensteiner were thus personally interested in the formation of the new firm, and Zuncker was informed of its purpose. All of them knew that the enterprise could not be launched unless the other partners contributed in some way the special capital which was required.

On the other hand, Hecht and Finn could not go into the partnership unless the capital was contributed by the Studebakers, Vette, Zuncker and Regensteiner without whose contributions the firm could not be formed. Each person thus knew exactly who his associates were to be, and that he was a party to a mutual agreement among all for the formation of a limited partnership under the name of Marcuse & Company. This arrangement and the purpose to be accomplished is reflected in the original arrangement for the limited partnership made in April, 1917, in which the accomplishment of some of the steps in this program were made conditions of the delivery of the partnership articles. (Pr. Rec., 318.) The petition in the Von Frantzius estate for the approval of the contract under which this arrangement with Marcuse was to be carried out and the contract itself which Marcuse made, were offered in evidence. (Pr. Rec., 478-479.)

In addition to these facts, there were other related contracts having a bearing on the question whether all of the other respondents could fairly be exempted from liability, if it is imposed upon Hecht and Finn. For upon the hearing it was disclosed that there was a private agreement between Marcuse and Vette and Zuncker, unknown to their associates, or at least to Hecht and Finn. Written agreements, substantially identical in form, were made between Marcuse and Vette and

Zuncker, respectively, on March 28, 1917, which it will be observed was a few days prior to the signing of the original articles of limited partnership. These agreements recited that Marcuse had requested Vette and Zuncker to become special partners in the firm of Marcuse & Company, and that they had agreed to do so upon the execution of this contract. And in consideration of this and of their execution of the special partnership contract forming the firm of Marcuse & Company, it was agreed: first, that Marcuse within one year from the execution of the special partnership contract, on request of Vette or Zuncker and the tender of and assignment of their interest in the business of Marcuse & Company, would pay to them $25,000 each (this being the amount of the special contribution of each), with six per cent interest, together with any profits that may have accrued to Vette or Zuncker from the firm, less payments made; and should thereupon indemnify Vette and Zuncker against all liability on account of the obligations of Marcuse & Company; second, that, if after the termination of the business of the partnership, Marcuse should continue in the brokerage business individually or in any new enterprise, Vette and Zuncker, upon contributing $25,000 each, should be entitled to the same proportionate interest in the new enterprise by way of interest, payments and distribution of net profits, as he was entitled to in the firm of Marcuse & Company under the special partnership contract, the amount of their contributions to be proportionately reduced if the amount of the new capital was less than in the old firm. (Pr. Rec., 665-666.)

The agreement in this form was adapted to the organization of the partnership as first planned, in which all of these parties, including Hoffman, the representa-

tive of the Studebakers, were to sign as special partners. When the plan was changed these private contracts between Marcuse, Vette and Zuncker were renewed by documents in all respects similar which bear the dates of June 30 and July 1, 1917. These recited that Marcuse had entered into a special partnership in which Hecht and Finn were special partners; that the latter had executed and delivered a declaration of trust covenanting to hold their interest as special partners in trust ratably for the holders of certain trust certificates under the Hecht-Finn trust; that Marcuse had requested Zuncker, and the latter had agreed, to pay into the trust $25,000 and accept certificates therefor. It then provided that in consideration of these facts Marcuse had agreed:

First. After April 1, 1918, on request of Zuncker and Vette and the tender and assignment of their respective certificates, to pay them respectively $25,000 with interest at six per cent from April 1, 1917, with a ratable proportion to which the holder of the certificate should be entitled, in any profits which then had accrued to the trust, less whatever funds had been paid on the certificate.

Second. To fully and completely indemnify Vette and Zuncker against any and all liability on account of any obligations of Marcuse & Company.

Third. If, after the termination of the copartnership, Marcuse should continue in the brokerage business individually or in any new enterprise, Zuncker and Vette should respectively have the option of contributing $25,000 to the new enterprise and having the same proportionate interest in it and in the net profits as he would be entitled to receive out of the business of the firm of Marcuse & Company. (Pr. Rec., 667-668.)

It thus was shown that both Vette and Zuncker, not only in connection with the original plan for the formation of the partnership, but in connection with the final form in which the plan was carried out, sought to protect themselves against the possibility of liability for the debts of Marcuse & Company and received from Marcuse a private indemnity against such liability, in which neither Hecht, Finn, nor, so far as the evidence discloses, Regensteiner or either of the Studebakers participated, and which was probably unknown to them. This indemnity was more general and inclusive in its terms with reference to the final form of the agreement than the first; for under the form first agreed on Marcuse was to indemnify Vette and Zuncker against liability in case he purchased their interest in the firm. (Pr. Rec., 666.) The indemnity in its final form obligated him to protect Zuncker and Vette against any liability for the debts of Marcuse & Company. (Pr. Rec., 668.)

THE PROVISIONS AND SCOPE OF THE HECHT-FINN TRUST AND THE POWERS AND CONTROL WHICH IT GAVE TO THE PARTIES INTER SESE.

Section 6 of the Hecht-Finn trust provides that the certificate holders should have no right, title or interest, direct, proprietary, or otherwise, in the partnership or in its property or assets, and that the legal and equitable right, title and interest therein should be vested in the trustees, Hecht and Finn. Construing this section in connection with other provisions of the trust, and especially those which fix the property which was the subject of the trust and constituted the trust fund, the following will be noted: The recitals of the agreement state that Hecht and Finn "by reason of their relation to the firm as special partners, are and will from time

to time become entitled to certain payments and distributions of the copartnership assets and the income, interest and profits of and upon said assets:" and that they "hold all and every their right, title and interest in and to the assets and the income, interest and profits of and upon the assets now or at any time belonging to the partnership," in trust. This expressly makes the interest of the special partners in the corpus of the property of the partnership, as well as in income derived from it, the subject of the trust; and shows that Hecht and Finn had no interest in it whatever except as trustees for the certificate holders, including themselves as such. It made them mere naked trustees; and it would be impossible in such a relation to exclude the interest which the certificate holders had in the trust fund and in the partnership of whose assets the trust fund thus constituted a most important part.

By Section 1 Hecht and Finn direct the partnership to pay to the Chicago Title & Trust Company for the account of the Hecht-Finn trust "all and any part or parts of the trust fund becoming at any time and from time to time payable or distributable to the trustees by reason of the articles of agreement aforesaid or by way of distribution of contributed capital upon any dissolution or accounting of such special partnership." (Pr. Rec., 26.)

Section 2 provides that the Trust Company shall distribute among the certificate holders the trust fund thus paid to the Trust Company in the proportions of their respective shareholdings. (Pr. Rec., 26-27.) The trust fund thus to be distributed includes both contributed capital and profits.

Section 3 gives the form of the certificates and provides that "by the acceptance of this certificate, the

holder hereof accepts said agreement (the Hecht-Finn trust, to which the articles of partnership were annexed), and becomes bound thereby in the same manner as if he had been named in and had executed the same." (Pr. Rec., 27.)

Section 4 provides that the profits to which Hecht and Finn, as special partners, are entitled, should be drawn out of the business and paid to the Trust Company at least twice a year. (Pr. Rec., 28.)

Section 6, to which we have referred, after providing that the legal and equitable title in the partnership property shall be vested in the trustees, provides that the interest of a certificate holder shall "consist solely of the right to receive his proportionate share of the net part or parts of the trust fund from time to time payable to the trust company herein, including the proportionate share of such holder of the corpus of said fund, upon any dissolution of said copartnership." (Pr. Rec., 29.)

The right of the certificate holders was not limited to proceeds arising from the partnership after they were segregated and separated therefrom, but was expressly impressed both upon income and the corpus which was payable to the Trust Company as trustee and included what was payable upon dissolution of the firm. Section 3 (Pr. Rec., 28) provides that the Trust Company should not be liable except for what is actually received from the trust fund, and should be under no obligation to take any active steps to enforce payment or delivery to it of any part of the trust fund.

Section 7 contained the ordinary provision in a trust deed securing bonds, which is designed to prevent a suit by one bondholder without reference to the wishes of the others, and to lodge the control of such a suit either in

the hands of the trustee or a majority of the holders. It provides that no certificate holder can sue for dissolution of the copartnership or relief against it, or to enforce distribution of the trust fund, and that such actions shall be brought by Hecht and Finn, the trustees. But it also provides that these trustees should be under no obligation to commence such a suit unless requested by a majority of the certificate holders, and properly indemnified; but that, if they do not comply with such a request, then any one or more of the certificate holders may bring such a suit in the name of the trustees or otherwise. (Pr. Rec., 29.) This recognizes that the certificate holders have an interest in the corpus and income of the partnership sufficient to entitle them to maintain such a suit, and that the provision referred to is a mere regulation to keep control in the hands of the majority. This control and right to bring suit was in the hands of the certificate holders other than Hecht and Finn; for Hecht and Finn were only two out of seven certificate holders and did not hold anything like a majority in amount.

This interest is again recognized by Section 5, which provides that the certificate holders shall, "without any interference by the trustees (Hecht and Finn), or by the general partners," have access to the books of the partnership, and be furnished with an annual inventory of the assets, profits, losses, and liabilities, and of all payments, disbursements, and everything done by the general partners; and in addition to this they were to have the monthly trial balances when received by Hecht and Finn. These provisions, taken as a whole, definitely recognize the interest of the other respondents in the partnership, and the superiority of their right and power to any possessed by Hecht and Finn. This document was prepared

by Mr. Hoffman and the attorney for the Studebakers. (Pr. Rec., 28-29.)

So completely did these instruments withdraw from Hecht and Finn any control over the trust fund which was the subject matter of the Hecht-Finn trust, that Marcuse & Company would not have been protected if they had paid to them the share of the profits earned by the special capital or had returned that capital to them. The contemporaneous document signed by Marcuse, Morris, Hecht and Finn on June 30th, annexed to the papers creating the Hecht-Finn trust, stated that these parties assented to the provisions of the Hecht-Finn trust, and on behalf of the partnership and as individuals "agreed to do or cause to be done any and all acts * * * necessary, proper or convenient * * * in order fully and effectually to carry out the terms and provisions of the agreement." (Pr. Rec., 32.) Thus, while Hecht and Finn in the Hecht-Finn trust are called trustees, their so-called trust position was so purely formal that a special covenant binding the general partners and themselves as special partners, not even to allow any part of the trust fund to come into their possession, was executed and made a part of the trust papers and the accompanying partnership articles.

It will be noted that the Hecht-Finn trust—as a separate and individual document—was not signed by the respondents Vette, Zuncker, Regensteiner and the Studebakers. But as reliance is placed upon all of the documents contemporaneously executed as parts of a single transaction, and upon the legal effect of the substance of the transaction, when treated as an entirety, we call attention to these interlocking provisions of the documents under which all of the respondents concededly obtained rights in contributing their money.

The partnership agreement was expressly made an exhibit of the Hecht-Finn trust "and a part hereof with the same effect as if in the body hereof set forth in *haec verba.*" The trust agreement expressly names all of the respondents—assuming that Mr. Hoffman represented the Studebakers—as the persons to whom the original certificates shall be issued, and they were thus charter members in the association by name. The agreement expressly provided that by accepting a certificate the holder accepted the trust agreement and became bound by it in the same manner as if he had been named and had executed it. (Pr. Rec., 27.) And a part of these contemporaneous documents evidencing the agreement was that executed by Marcuse, Morris, Hecht and Finn agreeing on behalf of the partnership and themselves as individuals to the provisions of the trust agreement, and to do everything necessary to effectually carry it out. (Pr. Rec., 31-32.) This evidenced a written agreement with the respondents by name, in which the parties intended to eliminate any distinction in their mutual rights and relationships arising from the fact that each of the charter members did not sign all of the papers, without any one of which their contract would be incomplete.

BRIEF OF THE ARGUMENT.

I.

NONE OF THE RESPONDENTS WERE GENERAL PARTNERS IN THE FIRM OF MARCUSE & CO., OR LIABLE TO CREDITORS AS SUCH.

The claim that respondents were general partners in the firm of Marcuse & Co. is based upon two statutes, the Limited Partnership of 1874 and that of 1917. It is contended that these statutes must be considered and applied to the facts both separately and in combination in order to destroy the protection which respondents would otherwise have.

We therefore refer to these statutes and the rights of the parties under them, both separately and in combination.

A.

THE ACT OF 1874.

If the Limited Partnership Act of 1874 applies to the case, then Hecht and Finn are not liable as general partners; for the provisions of that law were duly complied with.

1. The certificate was in the form and filed in the office required by the statute.

2. It was not alleged in any pleading nor did the District Court find, that there was any false statement in the affidavit or any failure to comply with the law of 1874. The court merely held that the firm of Marcuse & Company was a general and not a special partnership, because the proper statutory steps were not

taken; and that the "so-called special partners," who were thus held to be general partners, included all the parties who had thus contributed to the special capital. (Pr. Rec., 689.)

3. The contention that the certificate was false and did not comply with the statute because it failed to state the names and contributions of the other respondents, merely begs the whole question. For it assumes that the other respondents were special partners, and that therefore their names should have been stated.

That such omission does not make the partnership a general one, see:

Crehan v. *Megargel*, 234 N. Y. 67 (76-7).

B.

THE STATUTE OF 1874 AS AFFECTED BY THE TWO STATUTES WHICH WERE PASSED, AND TOOK EFFECT CONTEMPORANEOUSLY IN 1917, VIZ., THE UNIFORM LIMITED PARTNERSHIP ACT AND THE UNIFORM PARTNERSHIP ACT.

1. Admittedly these parties intended to form a limited partnership under the statutory law of Illinois. The theory that their acts, although in compliance with the law in force and to which they were bound to conform, on Saturday, June 30th, ceased to protect them or to justify an act done on Monday, is that on the intervening Sunday a repealing act had taken effect which wholly nullified the law under which they contracted and paid their money, and not only rendered void but unlawful any act in accordance with that law.

The new statute was not a mere repeal and prohibition. It was a repeal by modification and substitution. It applied to the same subject matter, and was designed to relieve parties from the unjust hardships of which

this case furnishes such a glaring instance. Being remedial, it would be liberally construed, even if it did not so provide.

This is decided by the Supreme Court of Illinois, holding that statutes passed to secure uniformity in the law are not to be construed as perpetuating the laws which they are intended to displace, whether these rules result from prior statutes or decisions. On the contrary, they are to be construed with liberality, so as to prevent the continued application of those rules.

> See *City Bank* v. *Bank of Republic*, 300 Ill. 103 (106-7).

This case involved the Uniform Negotiable Instrument Law. This principle accords with the decision of this court in

> *Commercial Natl. Bank of New Orleans* v. *Canal-Louisiana Bank*, 239 U. S. 520 (526-9).

This decision involved the Uniform Bill of Lading Act.

2. When the Act of 1917 was passed there had been in force for many years in Illinois the statutory rule that a new statute should not in any way affect acts or rights under existing laws.

We quote the statute in full:

> "No new law shall be construed to repeal a former law, whether such former law is expressly repealed or not as to any offense committed against the former law, or as to any act done, any penalty, forfeiture or punishment incurred, or any right accrued, or claim arising under the former law, or in any way whatever to affect any such offense or act so committed or done, or any penalty, forfeiture or punishment so incurred, or any right accrued, or claim arising before the new law takes effect, save only that the proceedings thereafter shall conform,

so far as practicable, to the laws in force at the time of such proceeding. If any penalty, forfeiture or punishment be mitigated by any provisions of a new law, such provision may, by the consent of the party affected, be applied to any judgment pronounced after the new law takes effect. This section shall extend to all repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act."

Illinois Statutes, Chapter 131, Section 4. (Passed in 1845.)

It would be contrary to this rule of construction to hold either:

That the contract and the rights of respondents, arising from that contract and the payment of their money on June 30th, were affected by the statute which took effect the following morning.

That creditors whose claims had not arisen on June 30th—for the firm had not then begun business—secured a right by the new law.

It is a fair, and not a strained, application of this statute to hold that renouncing any interest in the profits of a limited partnership, comes within the provision that "proceedings thereafter shall conform as near as may be to the laws in force at the time of such proceeding."

3. The statute of 1917, especially in the light of a declared principle of construction which had been in force for seventy years, shows an intention to preserve and not destroy right, and not to render ineffective acts done under and on the faith of the previous statute.

It provided that a limited partnership formed under the Act of 1874 should continue to be governed by that

law; and this provision is made a part of the repealing clause. The two sections are as follows:

> "SEC. 30. *Provisions for Existing Limited Partnerships.* (2) A limited partnership formed under any statute of this State prior to the adoption of this act, until or unless it becomes a limited partnership under this act, shall continue to be governed by the provisions of an act entitled, 'An Act to Revise the Law in Relation to Limited Partnerships,' approved March 18, 1874, in force July 1, 1874, except that such partnership shall not be renewed unless so provided in the original agreement.
>
> SEC. 31. *Act (Acts) Repealed.* Except as affecting existing limited partnerships to the extent set forth in Section 30, the act entitled 'An Act to Revise the Law in Relation to Limited Partnerships,' approved March 18, 1874, in force July 1, 1874, is hereby repealed."

The statute may thus be construed as continuing the old law in force at least for the purpose of allowing the parties to take the mere formal step of filing the articles of a partnership otherwise complete and ready for business.

Such construction is consistent both with its remedial purpose and with its express provisions (Section 28) that:

The rule of strict construction of statutes in derogation of the common law should not apply to it.

It should be construed so as to effect its general purpose to make uniform the laws of the states which enact it.

It should not be so construed as to impair the obligation of any contract existing *nor to affect any rights existing when the act goes into effect.*

The entire case of petitioners is based upon the contention that it did affect both the contract of respondents and their rights under it which existed before the

statute took effect. For in any view there was a contract between them on June 30th.

This purpose of the statute is also evidenced by its provisions that:

A limited partnership is formed where there has been substantial compliance in good faith with requirement of par. 1. (Section 2, par. 2.)

A false statement in the certificate shall create a liability only in favor of persons who suffer by relying upon it, and against the party who knew its falsity, when he signed the certificate, or learned of it in time to have it corrected before anyone acted in reliance on it. (Section 6.)

A limited partner is not liable as a general partner unless, in addition to exercising his rights as a limited partner, he takes part in the control of the business. (Section 7.)

One who has contributed to the capital *of a business,* erroneously believing that he has become a limited partner in a limited partnership is not, by reason of his exercise of the rights of a limited partner, a general partner in the firm or bound by its obligations, provided on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income. (Section 11.)

The certificate may be amended to correct erroneous statements, or to make it accurately represent the agreement between the members. (Section 24.)

A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership. (Section 26.)

In any case not provided for in the act, the rules of law and equity, including the law merchant, shall apply. (Section 29.)

4. This construction of the law is fortified by the fact that the contrary construction is based upon a mere accident of time involving a few hours. June 30th fell on Saturday and the afternoon of that day being a legal holiday in Illinois, the county clerk's office was closed and the papers could not be filed until July 2nd, the day on which they were filed. The law usually contemplates that parties shall have an entire day to complete a transaction before a change in a statute will affect their rights. This principle can with fairness to all parties be applied to the mere formal step of filing a paper under such circumstances.

C.

THE UNIFORM PARTNERSHIP ACT OF 1917.

1. In construing these statutes both upon the question of a repeal of the Act of 1874, and the application of the new statutory law to existing partnerships, the Uniform Partnership Act of 1917 must also be considered. That act dealt with the general subject of partnerships, and was passed and took effect contemporaneously with the Uniform Limited Partnership Act, and is to be construed *in pari materia*. It defines a partnership as

> "An association of two or more persons to carry on as co-owners a business for profit." (Sec. 6.)

The same section (par. 2) provides:

> "But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act unless such association

> would have been a partnership in this state prior to the adoption of this Act; but this Act shall apply to limited partnerships, except in so far as the statutes relating to such partnerships are inconsistent herewith."

It also provides (Sec. 7) that

> "In determining whether a partnership exists, these rules shall apply:
>
> (1) Except as provided by Section 16 (relating to another matter) persons who are not partners as to each other are not partners as to third persons."

Petitioners' counsel claim that Marcuse & Co. was a general partnership by operation of the laws which took effect on July 1st; in other words, that it was the kind of an association to which the new Uniform (General) Partnership Law applied. By both the affirmative and negative provisions of that law an association is not a general partnership under the act unless it was a general partnership prior to July 1st. And the act deals with both general and limited partnerships, and that it shall apply to the latter unless the statutes relating to them are inconsistent with it. The provision that "those who are not partners as to each other are not partners as to third persons," is not inconsistent with anything in the limited partnership acts. On the contrary, it is consistent with the construction for which we contend.

These statutes, when construed together, show a plain intention to prevent a liability from attaching where the parties intend to form a limited and not a general partnership.

D.

UNDER THE LIMITED PARTNERSHIP ACT OF 1917.

1. If, by a rule of strict construction, it is held that no limited partnership was formed under the Act of 1874 because the certificate was filed in the county clerk's office on Monday instead of Saturday, then the statutes of 1917 should be held to apply. The fact that the parties intended to form a limited partnership under the law applicable to their purpose is still apparent and undisputed.

2. The papers were filed and the parties began business on July 2nd, the day provided in the articles, and at this time the new law was in force. If they are to be treated as affected with notice of the law, then they must be treated as intending to conform to the law in force at the time when they had provided the business should commence. And if they failed so to conform then they merely acted under an erroneous belief as to the effect of what they did.

3 The provision with reference to the formation of a limited partnership to engage in the brokerage business is not such as to make the formation of such a partnership void. Section 1 of the act defines a limited partnership and its effect as follows:

> "A limited partnership is a partnership formed by two or more persons *under the provisions of Section* 2, having as members one or more general partners and one or more limited partners. The limited partners, as such, shall not be bound by the obligations of the partnership."

Paragraph 1 of Section 2 provides that those desiring to form a limited partnership shall sign a certificate stating fourteen things specifically enumerated, and file

this in the office of the recorder of deeds. Paragraph 2 of this section then provides:

> "A limited partnership is formed if there has been substantial compliance in good faith with the requirements *of paragraph* 1."

Paragraph 1 *contains no provision about the brokerage business,* though it does contain a complete statement of the steps which will result in the *formation* of a limited partnership. The only reference to the subject of the brokerage business is in Section 3, an entirely separate section. And that section does not deal with the *formation* of the limited partnership, but only with the business which it may carry on after it is formed. Its language is permissive not prohibitory. It does not limit the application of either Section 1 or 2 as to what shall *constitute the formation* of a limited partnership, nor of Section 11 which protects against the consequences of a mistaken belief as to its formation.

4. In view of all of these facts, and in the light of the rule of statutory construction to which Illinois had always been committed the Limited Partnership Act of 1917 cannot fairly be construed so strictly as to render unlawful the completion of a limited partnership in which all essentials were finished before the law took effect, and there remained only the formal filing in an office which was closed while the old law was still in force. Such a construction would in substance give it a retroactive effect.

5. The papers which were filed constituted a substantial compliance with the Act of 1917, and, therefore, by its express provision "a limited partnership was formed." The only effect of filing the articles in the wrong office and engaging in the brokerage business, was to show an erroneous belief that "those contributing to the capital" of the business had so complied with

the law that "they were limited partners in a limited partnership." This would bring into operation Section 11 of the new act. Hecht and Finn fully complied with the provisions of that section by returning the money and renouncing their interest in the profits of the business.

II.

IF THE RESPONDENTS OTHERWISE WOULD HAVE BEEN LIABLE AS GENERAL PARTNERS, THEY WERE PROTECTED AGAINST SUCH LIABILITY BY THE ACT OF HECHT AND FINN IN REFUNDING THE MONEY WHICH HAD BEEN PAID TO RESPONDENTS BY THE FIRM AND RENOUNCING ANY INTEREST IN THE PROFITS OR OTHER COMPENSATION IN ACCORDANCE WITH THE STATUTE.

1. Section 11 of the Limited Partnership Act, 1917, provides as follows:

> SEC. 11. A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing (believing) that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income."

This was a remedial provision, designed to do away with the penalizing consequences which under former statutes and decisions had produced the unjust result of giving to innocent mistakes the consequences of imposing a liability never contemplated, either by the parties or by any creditor in trusting the firm.

The statute itself provides for its liberal construction. Sections 28-9 are as follows:

> "SEC. 28. RULES OF CONSTRUCTION—(1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.
>
> (2) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.
>
> (3) This act shall not be so construed as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued *before* this act takes effect.
>
> SEC. 29. RULES FOR CASES NOT PROVIDED IN THIS ACT—In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern."

Statutes passed to secure uniformity in the law are to be construed in this liberal spirit.

With reference to a similar statute (the Negotiable Instrument Law) the Supreme Court of Illinois said:

> "The law was enacted for the purpose of furnishing in itself a certain guide for the determination of all questions covered thereby relating to commercial paper, and so far as it speaks without ambiguity as to any such question reference to case law as it existed prior to the enactment is more likely to be misleading than beneficial. If the provisions of the act harmonize with the general principles of commercial law in force before its enactment, those principles should be followed. But if the language of the act conflicts with statutes or decisions in force before its enactment, the courts should not give the act a strained construction in order to make it harmonize with earlier statutes or decisions. If this is done the very purpose of the act is defeated; in order to keep the law as nearly as may be uniform the courts of all the states should keep in mind the spirit and object of the law and should give to the language of the act a natural and common con-

struction, so that all might be more likely to come to the same conclusion."

City Bank v. *Bank of Republic,* 300 Ill. 103 (106-7).

To the same effect is the decision of this court in

Commercial National Bank of New Orleans v. *Canal-Louisiana Bank,* 239 U. S. 520 (526-9).

2. Neither the language nor the spirit of the provision is limited to partnerships specifically organized under the new statute.

The statute itself deals both with limited partnerships organized under the old and the new act. This is true also of the Uniform General Partnership Act, which was concurrently adopted. The wording of the section is as broadly inclusive as could be devised. It does not say what may be done by a member of a limited partnership organized under any particular act, but gives the right to one who has contributed to the "Capital of a business conducted by a *person* or partnership erroneously believing," etc.

A business conducted by "a person" plainly could not, in a strict sense, be a limited partnership; and yet one who has contributed to the capital of such a business is expressly included within the protection of the statute.

No reason is suggested why a right thus given to prevent the accomplishment of injustice should not be enjoyed by anyone who comes within its description, irrespective of the particular statute which he had in mind and which produced his error, or even if he had no particular law in mind.

The remedial purpose of the law is defeated if it is not applied to a situation like that in this case, where the parties plainly *intended* to follow the law, even if

they made a mistake. The statute expressly applies to cases where there has been a mistake and not to cases where there was none. When there is no mistake the parties do not need the protection of the statute. When there is a mistake they need and are entitled to its protection.

As a prelude to a discussion of the decision of the Circuit Court of Appeals in this case, an editorial note in the Harvard Law Review (Vol. 36, 1016) uses the following apt language in discussing the reason for the insertion of this section in the new Uniform Limited Partnership Act:

> "Formulating the rule that statutes in derogation of the common law must be strictly construed, American courts have generally treated questions of statutory construction in an unsatisfactory manner. Even the Uniform Acts have been subjected to the rigors of the rule; and no legislative reforms have suffered more than the Limited Partnership Acts. These acts were passed in almost every jurisdiction to modify the rule in *Waugh* v. *Carver,* then prevailing, under which sharing in the profits was adopted as a conclusive test of partnership. The courts were, however, unfortunately rigorous in the application of the strict rule of construction, and the effort to afford business men a new and attractive form of commercial association was practically nullified. To remedy this situation the Uniform Limited Partnership Act was drafted. To insure it against the fate of its predecessors, there was embodied, in Section 11, a novel provision for the protection of those who erroneously believe themselves to be limited partners, under which such persons are relieved from liability as general partners, provided that on ascertaining the mistake they promptly renounce their interest in the profits."

The editor (Vol. 36, p. 1017) then discusses the interpretation of Section 11 in the opinion of the Circuit Court of Appeals now under review, in the following language:

> "A recent case tests the efficacy of the section.

The statute, as adopted in Illinois, expressly provides that no limited partnership shall be formed in the brokerage business. The petitioners, unaware of the adoption of this act and of the repeal of the former Limited Partnership Act, which did not contain such a prohibition, attempted to form such a partnership. The court, one judge dissenting, felt that Section 11 should be given the broadest possible interpretation and held that the petitioners were within its protection. The soundness of this position becomes apparent when it is considered that this act abandons the categorical approach of the common law and finally recognizes, as the Civil Law has long recognized, that the classification of commercial relationship into (1) debtor-creditor, (2) partnership, and (3) corporation is inadequate to meet the needs of a complex industrial society. The legislature has recognized that no strong public policy requires that a person who contributes to the capital of a business, acquires an interest in the profits, and has some degree of control over the conduct of the business, become individually bound for the obligation of the business, provided creditors are not misled. Since Section 11 was purposely introduced to prevent such persons from being necessarily bound, it would seem to deserve an interpretation sufficiently liberal to cover the case."

3. The application of the statute is not defeated by the fact that the business to be carried on was a brokerage business. This was legal under the statute in force when the partnership contract was made and the capital paid in. The parties certainly would be justified in believing that the completion of the statutory steps by filing the papers on Monday would not render void all that was valid on Saturday. But if mistaken in this, it merely shows the existence of the error, which entitles them to the benefit of the statute.

We have pointed out, *supra,* that there is at least good ground for holding that the new statute does not prohibit the formation of a limited partnership for a brok-

erage business. But even if this view is erroneous, it again only illustrates an error into which persons might innocently fall. If they did so, Section 11 is designed to cover their case.

As the Court of Appeals well said in its opinion:

> "Erroneous belief may be as to the nature of the business which may be organized into a limited partnership, as well as to any other matter of law or fact which induced the error."

There is no special reason or policy for excepting brokerage from the operation of the statute. He who has made an innocent mistake under circumstances like those here shown, is as fairly entitled to protection upon complying with the statute as in any other business.

In any event, the creditors of such a business receive all they are entitled to from the person whose erroneous belief is the subject of the statute.

If any creditor of a brokerage or other business has relied upon false representations or has some special equity arising out of similar facts, he still has a claim against the person who has misled him. But this does not change the status of those interested in the firm or extend the right to all creditors equally. No special right of this kind existed against respondents, or in favor of any creditor of the firm.

5. The mistake in this case was of mixed law and fact, but even if it were a mistake of law, the statute would still apply. It neither specifies nor indicates any limitation upon the character of the mistake, but deals with the erroneous belief, whatever may be its cause.

The principle of equity which grants relief in cases of contracts affected by a mistake is not limited to mistakes of fact, but

> "The fact that interpretation, or construction of

a contract presents a question of law and that, therefore, the mistake was one of law is not a bar to granting relief."

Philippine Sugar Estates Development v. *The Govt. of the Philippine Islands,* 247 U. S. 385 (389).

The Limited Partnership Act of 1917 states that in cases not provided for in the act, the rules of law and equity shall govern. This fortifies the conclusion that the principle of equity above referred to, especially in connection with the purpose of the statute, should be applied and thus that the character of the mistake should not be limited to one of fact.

6. The application of the statute cannot be denied because the parties adopted this form of contract in the belief that it would comply with the rules of the Stock Exchange. No fraud was intended, or committed, on the Stock Exchange, or any of its members. And in any view, its equities and the rights of its members are neither involved nor asserted in this case and cannot be made the ground of a decision between creditors of the firm and respondents.

7. The money paid by Hecht and Finn was sufficient in amount to comply with the statute. No claim was ever made until petitioner's brief was filed in this court, that the amount was insufficient if the statute applied. There was no evidence that any dividend was paid upon the old claims against the Von Frantzius estate. The evidence clearly shows that the payment included all that had been received, with interest thereon. (Pr. Rec., 654-655.) The opinion of the Court of Appeals expressly states that it was conceded in that court that the payment was sufficient in amount if the statute applied.

8. The payment of money was made in this case as a

matter of caution and from a desire to comply to the fullest extent with the spirit as well as the letter of the law. It may be strongly contended that such payment is not necessarily required by the language of the statute. All that it requires is that the person who acted under an erroneous belief shall "on ascertaining the mistake promptly *renounce* his interest in the profits of the business, or other compensation, by way of income."

9. The protection of Section 11 cannot be withheld from respondents because the action under it by Hecht and Finn was taken after the insolvency of the firm.

The statute applies to those who have made a mistake and calls for action by them only when they have discovered the mistake. It is undisputed that neither Hecht, Finn or any of the respondents, or any of the creditors, discovered this mistake, or the situation out of which it arose until the bankruptcy proceedings were begun. (Pr. Rec., 654-656.)

It is an extreme construction to hold that the mere word *renounce* creates a statutory requirement that the renunciation must be accomplished by payment of money. This would make it the equivalent of "renounce and return."

Hecht and Finn, to avoid even the appearance of withholding any part of that which all respondents had unitedly received, paid the full amount. This certainly went to the limit of the rights of creditors, and of the obligations of respondents under this statute.

III.

THE RENUNCIATION AND REFUND BY HECHT AND FINN PROTECTS THOSE TWO RESPONDENTS EVEN IF IT DOES NOT LEGALLY HAVE THE EFFECT OF PROTECTING THE OTHER RESPONDENTS.

The other respondents contended in the Court of Appeals that they were entitled, under Section 11 of the Limited Partnership Act, to the benefit of the renunciation and refund by Hecht and Finn of the money which had been paid by the partnership.

On the other hand, it was contended by the petitioning creditors that the other respondents could not claim the benefit of the act of Hecht and Finn, because they refused to join in the contribution, or to authorize either the payment or the renunciation by Hecht and Finn as being done on their behalf. We joined in this contention of the other respondents in the court below.

It is our view of the law that because of the position which Hecht and Finn occupied the renunciation by them and the return of all of the money that had been paid to all the contributors to the capital of Marcuse & Co. other than the general partners, was such full compliance with the law that it should fairly be held to enure to the benefit of the other respondents and protect them from liability. This was the view taken by the Court of Appeals.

But if the view of petitioners is sustained that the other respondents are not entitled to the benefit of an act in which they refused to join, this does not detract from its effect as a protection to Hecht and Finn.

The law does not require that all shall join in such an act or that one shall return the money received by

others. It would be contrary to its purpose and spirit to hold that if one man who erroneously believed that he was a limited partner refused to join with another, either in the renunciation or payment, the accomplishment of the statutory purpose would be nullified. Each man is entitled to the benefit of the statute and if he renounces all his right and pays all the money which every one has received, he certainly is entitled to protection.

IV.

THE ACCIDENTAL CHAIN OF CIRCUMSTANCES RELIED UPON BY PETITIONERS CANNOT HAVE THE EFFECT OF CREATING A RELATION WHICH NO ONE EVER INTENDED, OR OF GIVING TO CREDITORS THE BENEFIT OF AN OBLIGATION WHICH THEY NEVER EXPECTED TO ENJOY.

BUT IF IT IS HELD THAT A STRICT CONSTRUCTION OF ARBITRARY RULES MUST BE ADOPTED AND APPLIED, AND THIS RESULTS IN IMPOSING SUCH A LIABILITY, THEN THE RUINOUS CONSEQUENCES SHOULD NOT BE APPLIED TO HECHT AND FINN ALONE. IF ON THESE FACTS HECHT AND FINN WERE GENERAL PARTNERS IN THE FIRM OF MARCUSE & CO., ARE NOT PROTECTED BY THEIR REFUND UNDER SECTION 11 OF THE ACT OF 1917, AND ARE LIABLE AS SUCH IN THESE PROCEEDINGS, THEN THE SAME LIABILITY TO RESPOND FOR THE LEGAL EFFECT OF A COMMON ENTERPRISE SHOULD BE IMPOSED UPON THE OTHER RESPONDENTS WHO WERE THEIR ASSOCIATES IN THAT ENTERPRISE.

1. If Hecht and Finn are held liable it will be upon the theory that contribution to the capital of a partnership, with the right to share in its profits, creates a relation to which the law attaches a liability for debts,

unless such liability is prevented by the operation of a statutory limitation. It is based upon that theory by petitioners, and every part of their argument involves it. If that principle applies to the case, then Vette, Zuncker, Regensteiner and the Studebakers also come within its operation.

2. The District Court found as a fact that these men "selected Hecht and Finn as the agents for the operation of the special partnership by and through Hecht and Finn." (Pr. Rec., 689.)

3. The petition to review did not, in its assignments of error in the Court of Appeals, challenge the correctness of the District Court's determination of this fact. (Petition, 27-30.)

4. The District Court's finding on this question of fact is supported by the evidence. (Testimony of Regensteiner, Pr. Rec., 428-429; Marcuse, Pr. Rec., 464-465-467-471-472.)

5. The question as to the character of the Hecht-Finn trust and whether it is a trust or a partnership, is to be determined by the law of Illinois. The character and effect of such an association under the laws of Massachusetts, either as settled by the decisions of that state or of the federal courts, is not controlling.

6. It has been held in Illinois that voluntary associations for profit are partnerships unless formed under a law limiting the liability of members.

It is also held that a joint stock company in which the members hold certificates evidencing their interest in the assets and profits is a partnership in which all are held liable as partners.

In one of the earliest decisions on this subject in Illinois the transaction was in the form of a trust.

Robbins v. *English,* 24 Ill. 387 (426).

This case, and the rule which it lays down, has been followed in subsequent cases.

People v. *Rose,* 219 Ill. 46 (60).
People v. *Brander,* 214 Ill. 26 (30).
Fougner v. *First Natl. Bank,* 141 Ill. 124.
Pettis v. *Atkins,* 60 Ill. 454.

See, also, 5 Corpus Juris, p. 1363 "Associations."

The association formed by the Hecht-Finn trust has those elements of a partnership which if some of the members are liable to creditors impose the liability upon all. Each of the certificate holders who associated themselves together contributed to its capital, and each had a share in its management proportionate to his interest, and shared in the profits on the same basis. The losses also were shared in this manner, for the united capital was placed at the hazard of the business. Hecht and Finn were members of the association as certificate holders, but had no interest or power greater than that of the other certificate holders. The power over the affairs of the firm or the trust fund was effectively withdrawn from them, and they stood as mere naked trustees, not having even custody of the fund, or the right to its custody.

The trust began with the partnership of Marcuse & Co., was limited to the term of its existence, and covered nothing except the interest in that business created by the contribution of special capital. It was what the authorities call "a business venture," or "joint venture." It is essentially different from the so-called "Massachusetts trust" in which property is conveyed to a trustee, and he is by the trust itself given the right of management, as well as possession.

7. The liability of the other respondents jointly with Hecht and Finn, if the latter are liable, does not rest

upon the proposition, nor involve the result, that by forming the trust all of the associates *ipso facto* became liable, as partners in the firm of Marcuse & Company, to its creditors. Nor does it conflict with the proposition that there may be a subpartnership by an agreement to share the profits which are individually received by a partner. It rests upon the proposition that the Hecht-Finn trust, as created in connection with the formation of Marcuse & Company, was itself an association of these men; and that its liabilities, as a separate entity, rest equally upon those who created it, who contributed to its capital; who shared in its profits and who shared proportionately the losses represented by an impairment of that capital; and who had a right to share proportionately with Hecht and Finn in the management of this association or subpartnership. If a liability was incurred in the prosecution of the enterprise represented by this association or subpartnership, it was a liability of the association and all of its members and not an individual liability of either Hecht or Finn.

If, therefore, the court reaches the conclusion that Hecht and Finn are not protected against liability by the Limited Partnership Act of 1874, or by the Uniform Partnership Act and Uniform Limited Partnership Act of 1917, and that they are liable to creditors because of this contribution to the capital of Marcuse & Company and the right to share in its profits, then this liability is to be imposed upon the entity representing the associates whose united capital was thus contributed, and whose joint right to share in the profits is thus made the basis of liability. For the acts or omissions which create the liability are the acts or omissions of all, and not of Hecht and Finn alone.

If, as petitioners contend, the Hecht-Finn trust is held to be in substance such an association that it is to be

treated as a partnership, whether it be regarded as a subpartnership or not, then there is no limitation upon the liability of its members for its obligations. It is not a limited partnership and the liability of each member for whatever comes within the scope of its business is, therefore, unlimited. Therefore, if the barrier which we contend protects Hecht and Finn from liability, is passed over, no liability can be imposed upon one of these associates which is not to be shared by all.

8. Here Hecht and Finn are expressly stated to be the trustees of their associates, and the general partners were to conduct the business on behalf of all.

Petitioners' counsel assert that Hecht and Finn were the agents of the other respondents, and not really trustees. But whatever word is used the fact remains that they were the representatives of all in signing the partnership articles. If that act makes them liable, the consequences of the act cannot in fairness be limited to them to the exclusion of those for whom they acted.

9. We are now dealing with the question of the liability of the associates of Hecht and Finn, if, and only if, the latter are held liable. We do not contend that this association—or subassociation—*ipso facto* creates a liability for the debts of Marcuse & Company. Our point is that if such a liability has been incurred it results from the united act of all the associates in connection with the purpose of the association, and not from the individual act of Hecht and Finn; and that therefore the liability must rest, if at all, equally upon all who were thus associated together.

10. Where several parties are liable by contract—and that is the petitioners' claim in this case—all must be joined in any action upon it, if more than one is sued.

Even when the contract is joint and several, this rule

applies. The plaintiff may treat the contract as several and sue one party alone; but if, as in this case, he elects to treat it as joint by proceeding against more than one, he must join all, and cannot proceed against an intermediate number.

This is the established rule in Illinois.

Cummings v. *The People,* 50 Ill. 132 (135).

Tandrup v. *Sampsell,* 234 Ill. 526 (531).

Wisner v. *Catherwood,* 225 Ill. App. 471 (473-474).

The Illinois statute provides that:

"Except as otherwise provided in this Act, all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants."

Chapter 76, Section 3, Illinois Statutes.

This statute has been construed not to apply to partnerships so as to change the character of their obligations. Therefore if a creditor sues one partner without joining the others and recovers judgment, they are discharged from liability.

Fleming v. *Ross,* 225 Ill. 149 (151-2).

A partnership obligation being a joint obligation, however, and not a joint and several obligation, all persons who were partners in the firm at the time when the contract was made must be joined in an action to enforce payment unless there be a legal excuse (such as death or discharge in bankruptcy of one or more of the partners) for not joining them. Where this fact of non-joinder appears on the face of the declaration, the partners sued may avail themselves of that fact on error to defeat a right of recovery.

Sinsheimer v. *Skinner Mfg. Co.* 165 Ill. 116 (123).

Also where a plaintiff joins more than one of several joint obligors, he must recover against all or none; and a judgment against one defendant, though he be in default, and in favor of the others, will be reversed even when plaintiff appeals.

Kingsland v. *Koeppe*, 137 Ill. 344 (346).

Therefore, if a liability is created by these contracts it must be enforced against the other respondents, if it is enforced against Hecht and Finn.

This rule would apply with special force to a bankruptcy proceeding against an alleged partnership.

11. Every consideration of equity and fair dealing as between these respondents calls for the application of a united liability, if Hecht and Finn are held liable. And this is emphasized not only by the fact that Hecht and Finn were put forward one step in advance of their associates in the framework of the papers—and for the common benefit of all—but also by the fact that they alone paid the money and made the renunciation which gave the statutory protection. Their associates refused to join in or to authorize the payment or the renunciation of interest, yet claim the benefit of the act as one done in connection with the common enterprise, and therefore enuring to the benefit of all. We do not seek to deprive them of that benefit. But we do contend that the logic of moral fairness requires that they do not evade but respond to the legal consequences of the acts in which they did unite with Hecht and Finn.

ARGUMENT.

All of the respondents agree in contending:

That neither Hecht and Finn, nor the other respondents were general partners in the firm of Marcuse & Co.

That even if it should be held that they were such partners, the action taken by Hecht and Finn in renouncing all interest in profits, etc., and returning what had been paid, protected all the respondents under Section 11 of the Uniform Limited Partnership Act.

In our Brief of the Argument *supra,* we have stated the points upon which we rely upon those basic propositions in the case. We therefore confine the argument in this brief to the questions as to what should be done, if all of these questions are decided in favor of the petitioning creditors and it is held that Hecht and Finn were general partners.

IF HECHT AND FINN ARE HELD TO BE LIABLE AND NOT TO HAVE THE PROTECTION OF THE LAW OF 1917, THEN UNDER THE RULE THUS ESTABLISHED VETTE, ZUNCKER, REGENSTEINER AND THE STUDEBAKERS ARE EQUALLY LIABLE.

We contend that the old rule, against the practical injustice of which the Uniform Limited Partnership Act is directed, cannot be applied to this case for the purpose of penalizing any of these parties with personal liability for the debts of Marcuse & Company. But, if the court holds otherwise and applies it, then we contend that both legal logic and legal fairness unite in requiring that its application be not limited to Hecht and Finn, but be extended to include those who were associated with them in creating the situation out of which the liability arose.

In the first place, we submit that to so hold is but to

apply two principles well settled in Illinois, relating to joint liabilities, and to partnership debts.

Where an obligation is joint and several, the creditor has the right, when he proceeds to enforce it, to treat it as several and proceed against one obligor, or to treat it as joint and proceed against all. But he cannot proceed against any intermediate number, but must join all if he proceeds against more than one.

Cummings v. *The People*, 50 Ill. 132 (135).
Tandrup v. *Sampsell*, 234 Ill. 526 (531).
Wisner v. *Catherwood*, 225 Ill. App. 471 (473-474).

In the application of this rule it has been held that the statute of Illinois providing that

> "All joint obligations and covenants shall be taken and held as joint and several obligations,"

does not apply to partnerships. And it was therefore held that if a creditor sues one partner without joining the others and recovers judgment, the common law applies and the judgment is a bar to a subsequent action against the other partner.

Fleming v. *Ross*, 225 Ill. 149 (151-2).

A partnership obligation being a joint obligation however and not a joint and several obligation, all persons who were partners in the firm at the time when the contract was made must be joined in an action to enforce payment unless there be a legal excuse (such as death or discharge in bankruptcy of one or more of the partners) for not joining them. Where the fact of nonjoinder appears on the face of the declaration, the partners sued may avail themselves of that fact on error to defeat a right of recovery.

Sinsheimer v. *Skinner Mfg. Co.* 165 Ill. 116 (123).

Also that where a plaintiff joins more than one of several joint obligors, he must recover against all or none; and that a judgment against one defendant, though he be in default, and in favor of the others, will be reversed even when the plaintiff appeals.

Kingsland v. *Koeppe,* 137 Ill. 344 (348).

These rules of procedure have been changed by statute in many other states, but they still obtain in Illinois.

They are not rules enforced merely for the benefit of the plaintiff, but involve rights existing in favor of the defendant. He can raise the question of non-joinder, and is interested in having a joint adjudication, if only because of his right of contribution against those who were associated with him in the contractual relation out of which the liability arises.

These principles apply with special force to a bankruptcy proceeding. The petitioning creditors could not, if they wished, limit such a proceeding to a few of the partners; but are bound to join all, in order that there may be a complete adjudication such as the Bankruptcy Act contemplates. Therefore, if by the legal effect of these documents when construed together, all our other points are overruled, and the contention of the petitioning creditors that Hecht and Finn are general partners, is sustained, it seems to follow that all who were associated with them in the contractual relation which those documents create are necessary parties and should be subjected to the same liability. Of course, if it is held that Hecht and Finn are not liable, the points presented in the following argument become academic.

The case of the petitioners against Hecht and Finn is in its substance based upon the relation which petitioners claim was established with the other respondents by the united effect of all the documents into whose ex-

ecution all of the respondents joined. For the purpose of orderly consideration, we present an analysis of the different parts of the sequence of events out of which the liability arose, if at all, and upon which the petitioners rely to establish their case, and the other respondents rely for individual protection.

THE RELATIONS OF VETTE, ZUNCKER, REGENSTEINER AND THE STUDEBAKERS TO THE TRANSACTION WHICH CREATED THE LIMITED PARTNERSHIP OF MARCUSE & COMPANY AND THE HECHT-FINN TRUST.

It must be admitted by all parties that if any of those whom the petitioning creditors seek to charge with liability for the debts of Marcuse & Company are to be so held, it cannot be based upon provisions recognizing such liability in any document connected with the transaction. Every document in the series relied upon expressly repudiates the idea of such liability. If the court reaches the conclusion that this liability exists, it must first decide that the express provisions of all these documents, the intention which they express and the terms of the contract which they evidence, must be disregarded; that a controlling principle of law overrides both the form of the document, the terms of the contract and the intention of the parties; and that by the substance of the transaction itself a situation was created in which the law imposes the liability irrespective of the intention of the parties. If the court thus holds that it is to regard all these papers as mere forms and instrumentalities in the creation of a situation to which the law itself attaches the liability, then we submit that the form of papers, which are thus disregarded for the main purpose, cannot be used to penalize Hecht and Finn and free from the liability thus imposed upon them those who

united with them in the transaction out of which the liability arises.

This view seems more clearly to be a just one when it is considered that Hecht and Finn could not possibly derive from the transaction a benefit not shared by all the others, and were mere naked trustees having no right even to collect either the capital or the profits which were to be distributable to the special partners. And this is emphasized by the further fact that the $46,000 which was paid to the receiver in compliance with the statute, was paid entirely by Hecht and Finn, without contribution from these other parties, although it represented the money which they received; and that they now claim the benefit of that payment as protecting them from liability. The statute of 1917, upon whose provisions counsel for the associates of Hecht and Finn rely for exemption—because Hecht and Finn paid back the money which these associates received,—itself provides that cases not expressly provided for in it "shall be governed by the rules of law and equity." It would be plainly inequitable to allow these parties to put off upon Hecht and Finn—even if they sought to do so,—this ruinous liability, while claiming the benefit of their acts, and the right to keep the profits which they had received and which Hecht and Finn thus paid back.

In the Circuit Court of Appeals the other respondents successfully contended that they were entitled to the benefit of the act of Hecht and Finn because as it discharged those two, it also discharged the others, although they did not participate in the act. As the record stands, unless this act of Hecht and Finn applies to them and binds them, they have still all their right against the partnership and its profits which they ever had, unimpaired by any action of theirs. We do not deny that this

action of Hecht and Finn should inure to their benefit and give them protection against this liability; but we do insist that this can only be done upon a theory consistent with legal logic and with the principles of fairness which underlie such a transaction.

But the right of the other respondents to the benefit of this act must arise from the fact that there was among these parties a joint association in which the act of one, in connection with the enterprise, was in substance the act of all, which would inure to the benefit of all, and of which the person performing the act could not claim an individual benefit. The act of Hecht and Finn, though done with their individual funds, must nevertheless be regarded as an act of the association in which all of these persons were jointly and proportionately interested. Whether this association is called, as between the members, a partnership, or subpartnership, is not decisively material. It was an act which Hecht and Finn had the right to perform even if their associates refused to join in it. But it was done under Section 11 of the Act of 1917 in pursuance of either a duty, or a right, arising out of the application of that statute to the situation created by the Hecht-Finn trust, and the relation which that trust had to the partnership, whose articles were contemporaneously executed in order to make the trust possible. It, therefore, was an act of this association in the interest of all jointly. And certainly those who thus claim the benefit of it, must do so consistently with its purpose. They certainly come within the description in Section 11, "A person who has contributed to the capital of a business." And it is only by adopting the act of Hecht and Finn as bringing the petitioners under the protection of this section, that they can claim its benefit. And if compliance with this provision operates as a protection to Hecht and Finn

from a liability which otherwise might be imposed upon them—and we confidently assert that in any view of the case it does so protect them—then it would discharge the other members of their association only upon the theory that they were under a joint liability, and that thus, by the ordinary rule, a discharge of one could operate as a discharge of the others.

If the court proceeds on the theory that contribution to the capital of a firm, and the right to share in the profits distributable upon the capital thus contributed, creates in favor of creditors a liability for debts, then by the substance of this transaction that principle imposes upon the associates of Hecht and Finn the same liability which is imposed upon them. The logic and fairness of this is more clearly seen when we compare the transaction in its initial form and substance, with its final form. For we can then see whether there is any real contrast in the substance of those elements upon which the claim that this was a general partnership must rest.

The Initial Arrangement for a Limited Partnership.

Early in 1917 it had been agreed that a special partnership should be formed under the laws of Illinois, in which Marcuse and Morris were to be general partners, and Finn, Hecht, Hoffman, Vette and Regensteiner were to be special partners. So definitely was this agreed upon that the papers for the formation of a partnership were not only prepared but actually signed by all of these persons. The Studebakers themselves did not sign the document; it was, however, signed by Mr. Hoffman, who was their attorney. He had no interest in the matter himself, was not, himself, to contribute the money, but was acting as a mere naked trustee for the Stude-

bakers, whose money was to be used. (Hoffman's testimony, Pr. Rec., 670-681; Brown's testimony, Pr. Rec. 534.)

That the money was to be drawn from the funds which the Studebakers had in the Studebaker trust merely deals with the depositary from which they were to draw the money, leaving untouched the fact that it was their money which Mr. Hoffman was to use, and that to them would inure the benefit from contributing it to the capital of the firm. And the Studebaker Trust was a mere convenience of theirs for the handling of their funds.

The substance of the transaction, as thus planned, if carried out, would have been that each of these parties contributed his money as special capital in the firm of Marcuse & Company under papers which, on their face, would have kept him free from any personal liability, but would have subjected his contribution to the hazard of the business, and would have secured to him the profits which the capital earned, and the return of the capital upon dissolution. No one of them would have personally participated in the management of the business; they would, however, have had such rights of accounting, etc., against the firm as are inherent in an association of this kind.

The change in the transaction did not involve an abandonment of its substantial features above stated, by which each of these persons was to contribute special capital to the firm of Marcuse & Company, but only the form under which the conribution was to be made. The reason for the change, and its character demonstrate the continuity of the substance of the plan instead of a change in it. The evidence shows that but for the rule of the stock exchange which prohibited a special part-

nership with more than two special partners, the transaction would have been carried out in the exact form in which the document was executed; for no other reason was given for changing the papers. (Pr. Rec., testimony of Regensteiner, p. 442; Marcuse, pp. 458, 460, 464, 465; Zuncker, p. 397; Hoffman, p. 681; Finn, p. 257.) The change of the plan, therefore, was one which was designed to be a formal one, by eliminating all of the names except two from the list of special partners. The same people were to contribute their money as special capital; were to put it at the hazard of the business, and were to receive the profits distributable upon it, and the return of the capital upon dissolution; and this was to be done under documents which all understood and intended would—like those of the original form of the plan—free them from personal liability, and keep them from having any active participation in the affairs of the firm.

There was thus in the purpose and in the understanding of all parties a perfect identity between the transaction, and the effect of the transaction, in its initial and final forms as to the following elements which covered everything but the form of the papers.

Contribution to the capital of Marcuse & Co.

Placing this capital at the hazard of the business.

Sharing in the profits in proportion to the capital contributed.

Payment by the partnership of the profits distributable upon the contribution of each contributor, not to Hecht and Finn but to the contributor himself through an agency authorized by him to collect it and pay it to him.

Exemption of each contributor from personal liability.

That the original partnership papers were not finally delivered but were held in escrow for the performance of certain conditions does not affect the comparison between the substance of the transaction when initiated and when finished.

We have pointed out that in the initial transaction the Studebakers did not join in person, but were represented by Mr. Hoffman, who stood as a mere naked trustee for them in the contribution of their money. But no such formal representative intervened between Vette, Zuncker and Regensteiner, and they were personally to participate in the transaction from the start. And in the petition to the Circuit Court of Appeals, Studebaker joined with Vette, Zuncker and Regensteiner in the presentation of the case, and, in substance, their rights were put forward as being identical. And it is a fact of marked significance that Mr. Hoffman, testifying in answer to the questions of the District Judge with reference to his own understanding as to the result produced by the change in the papers by which Hecht and Finn alone appeared as special partners, in order to comply with the rule of the exchange, said that he understood that the liability of Hecht and Finn would not be any different from that of himself, Vette, Zuncker and Regensteiner. (Pr. Rec., p. 687.)

The Form and Substance of the Final Transaction of June 30, 1917.

In comparing its final form with the original plan, we should expect to find, if there is an identity in substance as the parties view it, (a) that the money was thus contributed by each to the special capital of the firm with the right to participate in its profits; (b) that Hecht and Finn, whose names were to be used as special part-

ners, had no greater right or power because of that fact; and (c) that the other contributors had at least substantially as much power as Hecht and Finn in the enterprise in which they were associating their capital as they would have had under the form of the plan as originally contemplated. Upon this last element it is important to bear in mind that if these parties, as holders of certificates under the Hecth-Finn trust, had a greater, or more direct, power than they would have had under the original plan, it brings them closer to the line of responsibility than the original plan would have done.

The documents by which this change was to be effected were prepared as parts of one plan, were contemporaneously executed, and were so interlocking and interdependent that under the ordinary rules of law they are to be construed together. They consist of the partnership agreement dated April 2, 1917, and executed on June 30, 1917, between Marcuse and Morris as general partners and Hecht and Finn as special partners; and the document known as the Hecht-Finn trust dated and executed June 30, 1917, of which the articles of partnership are expressly made a part; and the agreement of Marcuse, Morris, Hecht and Finn binding themselves and the form to carry out the arrangement.

The Articles of Partnership.

These provided, among other things, for the keeping of books by the general partners and the right of access and examination by the special partners or their nominees; for the rendition of yearly accounts of the affairs of the firm to the special partners as well as a monthly trial balance. The special partners could name auditors for the examination of the firm's affairs; and on report

could call for the dissolution of the firm. Upon the death of Marcuse the affairs of the firm were to be liquidated by an appointee of the special partners, and if they were unable to agree on a liquidator the Chicago Title and Trust Company was to appoint him. If either of the special partners died, the other succeeded to all his rights as though the survivor had contributed all of the special capital. If both died, the majority of the certificate holders were to designate a person to act as the successor of the special partners, and he was to have all the rights and powers of the special partners.

The Hecht-Finn Trust.

This document was signed by Hecht and Finn declaring the trust, and by the Chicago Title and Trust Company accepting the appointment as trustee under it. It was also signed by Marcuse, Morris, Hecht and Finn to evidence their consent to be bound by its provisions and to do everything required to effectuate its purpose.

It recited the provisions of the agreement forming the special partnership and made them a part of it; that Hecht and Finn jointly, as trustees, held every right and interest in the assets and profits of the partnership as a trust fund, and this interest in the assets, profits, etc., is referred to through the instrument as constituting the trust fund.

Nothing which might become due from the partnership to Hecht or Finn was to be paid to them, but everything was to be paid to the Chicago Title and Trust Company as trustee; and that company was to distribute all that it thus received among the certificate holders proportionately. The form of the certificates of interest under the trust expressly stated that they were subject to all the terms, etc., of the trust agreement; and that

each certificate holder, by the acceptance of the certificate, accepted the agreement and became bound *in the same manner as if he had been named in and had executed the document itself.*

It will thus be seen that there was absolutely withheld from Hecht and Finn the right to receive any money from the firm of Marcuse & Company even to the extent that the partnership articles on their face provided; that this money was to be paid to the trust company alone; and, in addition to this, that each one of the certificate holders specifically agreed that by accepting his certificate he stood in exactly the same relation as if he had signed the agreement of June 30th, which Hecht and Finn signed and of which the articles of partnership were specifically a part.

The trust agreement specified the contributions made by each of these parties by name, Richard Yates Hoffman, the representative of the Studebakers, being in the list. The amount of their contributions as stated footed up the exact sum which Hecht and Finn were stated in the articles of partnership to have contributed to its capital. It further provided that the profits to which Hecht and Finn, as special partners, might be entitled should be drawn out and paid to the trust company at least twice a year.

It gave to the certificate holders, "without any right of interference by Hecht and Finn or the general parters," the right of access to the books of the firm, and the right to have an annual inventory of its affairs and a monthly trial balance of its accounts. It provided that Hecht and Finn might select auditors for the business, but that they should revoke such appointment and appoint anyone named by a majority of the certificate holders. Upon a report by the auditors that the

business was not being safely or properly conducted, Hecht and Finn were bound, upon the written direction of a majority of the certificate holders, to take proceedings to procure a dissolution of the partnership. The certificate holders were to have no proprietary rights in the partnership or its property, this right being vested in Hecht and Finn as trustees, and the certificate holders were not to be construed as having assumed any liability with respect to the trust or the partnership. No certificate holder was to have a right to bring a suit in his own name for the dissolution of the partnership or to enforce distribution of its funds, but such suits were to be brought by Hecht and Finn. If upon request by a majority of the certificate holders and receiving indemnity, they refused to bring such an action, then the certificate holders could maintain it in their own name or in the name of the trustees. Hecht and Finn were not, either by the terms of the trust agreement or of the partnership agreement, to become personally liable except for individual and intentional acts or omissions. They were to be entitled to reimbursement for expenses and disbursements in connection with the administration of the trust and the performance of their duties thereunder. Upon the death of either Hecht or Finn, the survivor was to succeed to all the rights, duties and obligations as special partner, and in the event of the death of both, a majority of the certificate holders were to designate a successor acceptable to the general partners, and he should thereby become a special partner in the firm in place of the decedents. If the Chicago Title and Trust Company resigned as trustee, a majority of the certificate holders were authorized to appoint its successor.

By the direct agreement of the parties, the control of the matter was withheld from Hecht and Finn, who did

not have even the right to receive the profits distributable upon the special capital, nor any part of the trust fund of which they were nominal trustees. They were only two out of the six or seven persons thus associated together, and held less than a third of the "certificates of interest," a majority of which controlled the enterprise. From the very start Vette, Zuncker, Regensteiner and the Studebakers held a control against which Hecht and Finn were powerless.

The decision of this branch of the case does not depend upon a technical answer to the question whether the members of a "subpartnership" can be made liable for anything beyond the debts of that particular subpartnership; or whether the beneficiaries of such a trust can be held liable for debts not incurred by the association itself as such. Here if Hecht and Finn are held liable, it will be because of acts and documents which were the united act of all, and in the framing of which Hecht and Finn had no more creative influence than anyone else.

Nor is it decisive in favor of exempting the other respondents from liability that the documents provided that the holders of certificates under the Hecht-Finn Trust should incur no liability.

This, we submit, touches no more than the surface of the transaction. The Hecht-Finn trust, which was a mutual agreement between all of these parties, did provide that the certificate holders should not, by accepting the certificates, be construed to have assumed any liability with respect to the trust or the copartnership. (Sec .6, Pr. Rec., p. 29.) This provision, therefore, would be just as effective to protect Hecht and Finn as certificate holders from liability as it would to protect their associates. But this is not the only provision. Section

8 provides that Hecht and Finn, as trustees, should not, by reason of the trust or the articles of partnership, become personally liable on account of anything done or omitted to be done, with the exception that each should be liable personally for injury resulting from his own willful act or omission. (Pr. Rec., p. 30.) Thus there were two provisions exempting Hecht and Finn from any liability; one which protected them in their capacity as trustees and as members of the limited partnership, and the other which protected them in the only real and substantial capacity which they occupied, as certificate holders, equally with their associates.

For this mutual agreement the reciprocal exemption was a consideration. None of these parties contemplated that Hecht and Finn were to be under any greater liability than any of their associates. And we submit it would not be consistent with an honorable intention on the part of all the gentlemen responsible for this organization to construe their plan as contemplating a liability by Hecht and Finn and no responsibility by their associates. Mr. Hoffman clearly repudiates any such understanding on his part. (Pr. Rec., p. 687.) But Hecht and Finn assumed this position as formal special partners, and agreed to this exemption of their associates from liability, only in consideration of the mutual agreement that they, as trustees, should be under no liability, because of the position which they thus assumed. If the protection which the latter agreement was designed to give fails, the consideration for the agreement that their associates should be exempt certainly fails *in toto*.

We are dealing now with the result if liabilities are imposed upon one of these associates in favor of third persons and contrary to the intention and ex-

pectation of all the associates. If such liability is imposed by law upon Hecht and Finn, then to impose that liability upon them alone, because the mutual agreement contemplated that certificate holders (in which class they belong) should not be liable, and to disregard the exemption of their liability as trustees, would be to disregard the basic understanding between the parties. The result would be plainly unjust and contrary to the intention of all parties.

If the provisions exempting the trustees are ineffective to protect Hecht and Finn, we submit that provisions exempting certificate holders cannot be construed to relieve the other respondents from liability, and yet have no such effect upon Hecht and Finn who were associated with them as certificate holders.

The decision of a case almost always requires the court to compare the equities of the respective parties, and especially to consider whether one has done or omitted anything to the detriment of the other and in violation of some obligation toward him. To anyone who studies the record of this case with that thought in mind, the following stubborn facts will present themselves with the force of a reiterated contrast between the equities of the contending parties.

No creditor has even been misled or in any way prejudiced by anything relating to the method adopted for the formation of this partnership.

No one ever gave credit to Marcuse & Company because of the relation which these parties held towards the firm, either arising from the partnership articles as filed and published, or from the arrangement evidenced by the Hecht-Finn trust.

No one gave credit to the firm, or in any way changed his conduct because of his ignorance of the Hecht-Finn trust and of the fact that a part of the money was contributed by others than Hecht and Finn.

No creditor ever assumed that Hecht and Finn were liable for his debt, or that they had towards those who dealt with Marcuse & Company any other relation than that of limited partners who could not be held to a personal liability.

If, therefore, any of these parties are to be held liable, it must be by reason of mere accidental circumstances which had no effect in inducing creditors to deal with Marcuse & Company. None of these circumstances, therefore, created in favor of creditors that element which courts call an equity. To impose this liability upon Hecht, Finn or any of the other parties against whom an adjudication is sought, will be to impose upon them what has been aptly called a "penal liability," and give to creditors an unexpected and undeserved security.

We respectfully submit that it is the duty of this court to give effect to the policy adopted by the State of Illinois and by the numerous other states which have adopted the Uniform Partnership Act and the Uniform Limited Partnership Act by which investment in a limited partnership is intended to be made as safe and prudent a method of investment as the purchase of stock in a corporation. It would be the duty of the court to give effect to this new policy even if the court could not agree with the expediency of the policy so adopted, but we respectfully submit that there should be no conflict in this regard between the duty and the inclination of the court.

Under the old law, a limited partnership was almost universally recognized as a "trap" and legal "traps" are not a proper element of intelligent legislation or enlightened jurisprudence.

We respectfully submit that this court should affirm the decision of the Circuit Court of Appeals and that, in so doing, no equity will be disregarded. The persons who, acting upon the advice of experienced counsel, in-

vested moderate sums of money in the business of Marcuse & Company upon the express assurance that they incurred no liability beyond the possible loss of the individual investment, should not see themselves swept into hopeless bankruptcy because the enactment on June 28th of a statute which became effective July 1st had not come to the attention of their counsel on June 30th.

The customers of Marcuse dealt with that firm in reliance upon the unlimited liability of Marcuse and Morris, reinforced by the contribution of $190,000 of additional capital by the special partners. The customers did not claim that they ever supposed prior to the failure that there was any further financial responsibility on the part of the special partners. The individual contributors to the $190,000 of special capital were to secure a reward proportionate only to their investment. The payment of $46,000 by Hecht and Finn to the receiver has already added an element of capital beyond the legitimate expectations of the creditors.

It is equity, it is justice, it is the enlightened public policy adopted by the State of Illinois to give to the creditors all that upon which they had a right to rely and to give to the respondents the full protection of Section 11 of the law which, except for that provision, might have become the means of inflicting grievous and undeserved hardship upon the respondents.

Respectfully submitted,

Horace Kent Tenney,
Charles F. Harding,
Roger Sherman,
Attorneys for the Executors of Frank A. Hecht.
Carl Mayer,
Henry Russell Platt,
Attorneys for Joseph M. Finn.